IN THE MATTER OF AN ARBITRATION

BETWEEN

LONDON CATHOLIC DISCTRICT SCHOOL BOARD

AND

ONTARIO ENGLISH CATHTOLIC TEACHERS ASSOCATION

GRIEVANCE OF MYRIAM MICHAIL

Arbitrator:	Richard Brown
For the Union:	David Bloom
For the Employer:	Chris White and Beth Traynor
Hearing:	Nov. 14, 2013; Apr. 8 and 9, May 13 and 26, June 2, 13 and 18, Aug. 29, Oct. 9 and 30, Nov. 3, 4, 11, 17, 24 and 28, 2014; Feb. 13, Mar. 24, Apr. 2, 17, 22 and May 4, 20, 21 and 26, 2015 London, Ontario

Contents

Myriam Michail is a teacher with the London District Catholic School Board (LDCSB). She taught French for many years until her deteriorating health forced her to give up classroom teaching. Since February of 2011 she has been assigned to work as a guidance counsellor. The instant grievance, dated April 26, 2013, concerns events occurring during the 2012-13 school year at Regina Mundi College (RMC).

BACKGROUND

The events prompting this grievance happened during a period spanned by a hearing of an earlier grievance by Ms. Michail about her experience as a guidance counselor at RMC during the two preceding school years. The hearing of the first grievance commenced on May 25, 2012 and ended on June 27, 2013. During the course of that hearing, the parties fashioned a partial settlement, incorporated in an interim consent award, dated April 12, 2013, fully compensating the grievor for her loss of earnings and providing for her ongoing accommodation as a guidance counsellor. I was left to determine whether the employer had violated the *Human Rights Code* and, if so, whether the grievor was entitled to damages for any non-monetary injury suffered.

In an award dated August 2, 2013, I concluded the employer's treatment of the grievor had contravened the *Code*:

> Mr. Sheardown [the Vice-Principal to whom the grievor reported] allowed an illegitimate complaint by a CUPE member [the guidance secretary] to delay the installation of computer and phone wiring [for the grievor's workspace] in February of 2011. He also failed to take reasonable steps to ensure Ms. Michail was treated with dignity and respect by some of her fellow counsellors [who objected to her being accommodated in the guidance department.] At the end of February, she received a public scolding from Mr. Sheardown. This scolding was obviously improper, but it was not pre-meditated and occurred during the course of a well-intentioned, albeit

> ill-conceived, attempt to assist the grievor. She was absent from work between the end of February and June of 2011. From one perspective, this absence could be attributed to the preceding violations of the *Code*. On the other hand, the grievor might have been absent, perhaps for a [longer] period that included all of February, if the employer had not offered her an over-complement assignment in guidance, something it was not obligated to do and deserves credit for doing. In November of 2011, the employer's improper delay, in responding to Ms. Michail's request for accommodation, prevented her from returning to work in a timely fashion. By November her sick credits had run out, leaving her without income. She was denied a placement at RMC because of her concerns about reporting to Mr. Sheardown who had neither apologized nor undertaken to mend his ways. Upon returning to work at the end of November, she was required to make the tiring commute to Strathroy for a month.

I awarded the grievor $7,500 for injury to dignity, feelings and self-respect.

According to the terms of the interim consent award, any subsequent grievance, including the one at hand, shall be dealt with as a "continuation" of the proceeding relating to the first and in deciding any subsequent grievance I may "consider any finding of fact" previously made.

The grievance at hand alleges Ms. Michail was the victim of harassment and discrimination by four individuals at RMC: Principal Nick Vecchio; Vice-Principal Rick Sheardown; Rod Lucier, the teacher responsible for student success; and Shannon Askew, the guidance secretary. During her testimony, Ms. Michail also complained of being mistreated by several other members of the RMC staff: Colette McNally, a guidance counsellor and co-op teacher; Barb Mahon, the teacher in charge of learning services; Tom Dutton, the head custodian; Kimberley Lajoie, the school chaplain; and Mary Bechberger, the head of the religion department. The employer made no objection to the association leading evidence about people not mentioned in grievance.

I digress to note most of these people played no part in the events leading to the first grievance about the two preceding school years. Mr. Sheardown did play a

major role as summarized in the above quoted passage from my earlier award. Mr. Vecchio has been principal at RMC since September of 2010 but he was not directly implicated by the first grievance. I note two former guidance counsellors and a former guidance secretary, who had objected to the grievor's accommodation in February of 2011, were not working at RMC during the period covered by the current grievance.

The association also contends both senior managers and human resource representatives discriminated against the grievor and demonstrated bias against her in the way they responded to the concerns she had raised about what was happening at RMC. The individuals in question are: Superintendent Ed DeDecker; Maureen Bedek, executive officer responsible for human resource; Karin Kristoferson, labour relations officer; and Amy Davis, manager of health and wellness.

Some of Ms. Michail's concerns relate to her workload as a guidance counsellor. Even though the subject of workload is not addressed in the written grievance, the employer did not object to it being raised before me.

One of the remedies requested in the grievance was the appointment of an independent investigator. The employer engaged Elizabeth Hewitt to conduct an investigation. After interviewing the grievor and those alleged by the written grievance to have mistreated her, Ms. Hewitt issued a report, dated September 6, 2013, sustaining some but not all of the grievor's complaints. For the purpose of this proceeding, the employer undertook not to contest any adverse finding made by Ms. Hewitt.

The employer also made a "with prejudice" offer in an unsuccessful attempt to settle this matter or narrow the issues in dispute. The offer included:

- removal from the grievor's file of Mr. Vecchio's letter, dated February 19, 2012 about performance matters

- an apology for the manner in which the grievor had been treated during the 2012-13 school year
- an undertaking to take "reasonable and appropriate steps in dealing with the those individuals who did not deal with the grievor, or her concerns appropriately."

The employer indicated its willingness to pay general damages by including in the offer a paragraph with a blank space for the amount of such damages. The association was invited to suggest an amount. The association did not propose a figure or make any sort of counter-offer.

Opening statements were made on November 14, 2013. Before the hearing resumed, Ms. Michail filed a third grievance relating to her experience at another school during the 2013-14 school year. The grievor then testified over the course of five hearing days, the last being June 2, 2014. In a letter to the association, dated June 19, the employer announced it was reviewing the "viability" of the employment relationship. The association immediately objected, calling such a review "intentionally inflammatory." In a further letter dated July 15, the employer stated its review was prompted both by the grievor's testimony, indicating "her anger and mistrust towards her employer" and by events at her new school during the 2013-14 school year. The association responded by filing another grievance. The employer terminated the grievor, by letter dated October 29, prompting yet another grievance. The third, fourth and fifth grievances have not yet been heard.

The association called the grievor and two of her colleagues, Patricia Bourke and Roberta Mazzariol, to testify about the events giving rise to the instant grievance. The employer called no witnesses in relation to these events.

EVIDENCE

Workload

The two other guidance counsellors during the year in question were Patricia Bourke and Collette McNally. Ms. Bourke had been a counsellor at RMC since 1989 and had served as acting head of the department since November of 2011. Ms. McNally had been assigned some guidance sections in preceding years.

At the beginning of September of 2012, the grievor was responsible for approximately 500 students, one half of the entire student body. The remaining students were assigned to Ms. Bourke. Ms. McNally initially had no direct responsibility for students. The grievor testified that a guideline published by the Ministry of Education contemplates each counsellor being responsible for 370 students. This testimony was neither challenged nor contradicted.

Ms. McNally's assignment for the first semester was one section of guidance and two sections of coop; her assignment for the second semester was three sections of guidance. As a result of her assignments, the guidance department was understaffed in the first semester relative to the second. Ms. Bourke testified this sort of imbalance had never before existed during her lengthy tenure at RMC. She said such an imbalance was particularly problematic in 2012-13 because she was relatively new to the role of department head, Ms. Michail was new to first semester guidance procedures and the secretary was new to the department.

Ms. Bourke asked Mr. Sheardown and Mr. Vecchio to correct the imbalance by giving Ms. McNally two sections of guidance in each semester but this request was not granted. The department head suggested Ms. McNally could share the coop class in the first semester with Roberta Mazzariol —one coop class equaling two sections—and take on one section of something else in the second semester.

According to Ms. Bourke, Ms. McNally did not want to share coop with Ms. Mazzariol, and the school administration refused to correct the imbalance.

In cross-examination, the grievor was asked about a statement she had made to Ms. Hewitt about why the school administration created an imbalance in guidance staff between the two semesters. When interviewed by the investigator, the grievor acknowledged having been told one advantage of giving Ms. McNally three section of guidance in the second semester was that those sections could be transferred to Sanda Chevalier-Fell, the department head, in the event she returned from sick leave for the second semester. Asked in cross-examination if she accepted this rationale, the grievor replied in the negative, saying it was wrong to solve one problem by creating another.

Despite the staff imbalance between the two semesters, Ms. Bourke initially decided not to give Ms. McNally direct responsibility for any students in the first semester, thereby further increasing the grievor's workload. At the outset Ms. Bourke assigned Ms. McNally all of the other duties normally performed by the entire complement of guidance counsellors. In late September or early October, after the grievor had complained about the number of students assigned to her, Ms. Bourke transferred approximately 60 of the grievor's students to Ms. McNally.

To deal with her student load, Ms. Michail worked long hours and often skipped her lunch break. In early November, she brought her work load to the attention of her local OECTA representative. In an email to Sheila Bresica, president of OECTA's London unit, and Shelley Malone, vice-president, the grievor contended her duties were "contributing to stress and physical exhaustion." The grievor testified Ms. Bresica and Ms. Malone declined to file a grievance challenging her workload during the first semester as a failure to accommodate her disability. There is no evidence the grievor made a request for accommodation in this regard to any management representative.

The other workload issue about which Ms. Michail testified relates to special-education students. In an email dated August 27, 2012 to the three guidance counsellors, Ms. Mahon, head of learning services, stated:

> You can pick courses for the exceptional students who are in your caseload without consulting us first. We realize that everyone is super busy now and it would be easier to just make the decision without having to seek our response. We trust in your professional judgment.

The past practice at RMC had been for learning-services teachers to oversee the selection of courses for their students and for guidance counsellors to merely record the selection already made. The grievor read the August 27 email as a direction to change this practice. She testified the new practice introduced by Ms. Mahon increased her workload by requiring her to oversee the selection of courses for learning services students. Nonetheless, she followed this practice without voicing any objection at the time other than to Ms. Bourke. Ms. Bourke testified this change was significant because learning services students need more assistance than other students. Ms. Bourke spoke to Mr. Vecchio about the change but he declined to intervene. In an email November 22, 2012, Ms. Mahon proposed reverting to the original practice and that is what eventually happened.

Interactions with RMC Staff

Most of Ms. Michail's complaints relate to interactions with other employees. The first incident of this sort, occurring on August 24, 2012, involved Tom Dutton, the head custodian. The grievor asked him to move her desk further from the air conditioner in the office temporarily assigned to her. The long-term occupant of the office, Sandra Chevalier-Fell, was absent on medical leave. According to the grievor, Mr. Dutton declined to move the desk and yelled at her, saying nothing in Ms. Chevalier-Fells office should be rearranged.

Faced with this refusal, the grievor telephoned Amy Davis. Ms. Davis arranged for the desk to be moved the next day. In an email sent on October 31 to Maureen Bedek, Ms. Davis stated her phone call with the grievor last forty-five minutes, she was crying and emotional and she asked why her employer did not want her back. Asked about this email, Ms. Michail did not dispute Ms. Davis' description of her emotional state but did say she had asked why Mr. Vecchio, not her employer, did not want her back. She also testified that she believed the custodian's refusal was based on his knowledge that the principal would not object to her being treated badly.

Ms. Michail testified Mr. Sheardown and Mr. Lucier failed to provide information required to do her job. She gave specifics about a single incident in September relating to inquiries she made about a student. Mr. Lucier referred her to Mr. Sheardown and Mr. Sheardown referred her to Mr. Lucier. On September 14, Ms. Bourke emailed the vice-principal about this, suggesting everyone work together and share information. Mr. Sheardown promptly emailed the grievor, providing the information she needed. He also wrote: "I apologize for not being clearer about this when we spoke earlier." In my view, this single incident is insufficient to support the grievor's contention that Mr. Lucier and Mr. Sheardown generally failed to assist her.

An incident involving Mr. Vecchio occurred on September 19. The previous day Ms. Michail had mistakenly registered a student whom Mr. Vecchio had told not to register because he was wanted by the police and had a criminal record. Realizing her mistake the next day, the grievor reported it to Mr. Vecchio. According to her, he "yelled" at her, stormed off and returned with Mr. Sheardown. The vice-principal said the school had no right to refuse to register a student and told the grievor not to worry. In her testimony, the grievor described the vice-principal's conduct on this occasion as "very nice." Upset by Mr.

Vecchio's reaction to her mistake, the grievor did not report for work on September 20. Ms. Davis subsequently told Ms. Bedek the grievor had "made a mistake, cried at work and then called in sick the next day.

Ms. Michail also objected to an email sent by Collette McNally on October 12, about an upcoming event at Fanshaw College, saying the grievor had provided "no help in organizing, following up or collecting $." Ms. McNally had intended to send this email to Ms. Askew, the guidance secretary, but sent it to the grievor by mistake. The grievor asked Ms. McNally to explain her email. She then apologized for being "mean."

Ms. Michail also alleged Ms. McNally refused to "provide information." The grievor mentioned only one specific incident of this sort, when she asked a question about a student and Ms. McNally suggested she read the student's file.

On September 17 Amy Davis emailed Nick Vecchio about a medical note saying the grievor was unable to do on-call. Ms. Davis had directed Mr. Vecchio to comply with the medical note due to the "litigious nature of the situation," saying the employer would challenge the note later because it addressed "job tasks" rather than "medical restrictions." Ms. Davis emailed Maureen Bedek on October 31, reporting the principal and vice-principal were frustrated by the grievor's "inability to do on-call" and "emotional fragility."

The next incident cited by the grievor occurred at a meeting on November 28 about students at risk for social, financial or health reasons. Monthly meetings of this sort were chaired by Rod Lucier and typically attended by the principal or a vice-principal, guidance counsellors, learning services teachers, the attendance counsellor, the social worker and the chaplain. Ms. Bourke testified that in previous years such meetings typically lasted half a day. In 2012-13 Mr. Lucier scheduled each meeting to be one hour in duration and directed each participant to propose only one student at risk for discussion.

At the meeting on November 28, except for the grievor, all participants limited themselves to raising one student, although Ms. Bourke did suggest more than one hour was required so more students could be considered. Ms. Bourke, like the grievor was responsible for more students than most people at the meeting. Nonetheless, the acting department head dealt with just one, apparently out of deference to Mr. Lucier as chair of the meeting.

As the end of the meeting approached, the grievor took her turn last. She attempted to distribute a list of twelve students, whom she viewed as having pressing needs, determined to address more than one of them and not caring if the meeting extended beyond the hour planned. Mr. Lucier put his hand out to block the distribution, pushing the papers back towards the grievor and saying her list was not wanted. Mr. Sheardown then asked the grievor to name the one student who was causing her to lose sleep. This comment elicited laughter from others in attendance. The grievor initially replied to Mr. Sheardown by refusing to pick just one student but she ultimately spoke about the first one on her list.

The grievor testified she was humiliated by the laughter. She accused the vice-principal of empowering Mr. Lucier to ignore her list. She recounted feeling compelled to transgress the one-student rule in order to fulfill her obligation to her students. Ms. Bourke described Mr. Lucier's conduct as "disrespectful". She described the laughter prompted by Mr. Sheardown's comment as "cruel" and "appalling", saying it was at the grievor's expense. She also testified Mr. Sheardown and Mr. Lucier did not want the grievor at RMC, but she offered no basis for this conclusion. In cross-examination, Ms. Bourke conceded even the chaplain laughed.

After the meeting, Ms. Bourke and Ms. Mahon both suggested to Mr. Lucier that longer meetings should be scheduled so more students could be discussed. The meeting format was changed accordingly.

There were two incidents involving Ms. Michail and Mr. Vecchio on December 11. The first occurred shortly after a morning announcement had invited staff to identify problems with the PA system. The speaker in the grievor's office had not been working all semester and her previous requests to have it fixed had been to no avail. Prompted by the announcement, she went to the office and told Mr. Vecchio her speaker had been broken since September. According to the grievor, he responded by tapping her on the temples two or three times with his index fingers, asking how would he know if she did not tell him.

Mr. Vecchio did not testify at the hearing but in an email dated May 10, 2013, written shortly after the grievance had been filed, he denied tapping the grievor in this manner. The email ends with the following comment: "By the way, met with Miriam this morning and started tapping her on the temples---as a sign of endearment… italians do this all the time… just kidding." This email was sent to Maureen Bedek and copied to Superintendent Ed DeDecker.

When interviewed by Ms. Hewitt, Mr. Vecchio again denied any temple tapping had occurred. Asked by the investigator whether he had spoken to the grievor about the PA system on the day in question, Mr. Vecchio first said he could not recall and later denied there was any such conversation. (His denial of the conversation is contradicted by his own email to the custodian, sent the day of the conversation, requesting the grievor's PA system be repaired.) Faced with conflicting accounts, Ms. Hewitt concluded the tapping did occur. The employer does not contest this finding by its investigator.

Immediately after the temple-tapping incident, the grievor demonstrated what had happened to Ms. Bourke, asking is it "normal." Asked in cross-examination if the grievor appeared upset, Ms. Bourke said answered in the affirmative.

In an email described below, sent to union representatives the day after the temple-tapping incident, the grievor described what Mr. Vecchio had done as a "condescending" comment coupled with a "physical touch." At the hearing, Ms. Michail characterized the tapping as a battery, saying Mr. Vecchio appeared "angry" and "ticked off." She demonstrated a forceful tapping of her own temples. Asked in cross-examination whether Mr. Vecchio was normally "demonstrative", the grievor replied he was "dramatic." She went on to say he had given her hugs in that past and that was "ok."

The second incident on December 11, 2012 related to an email sent by Ms. Michail to three coop teachers the day before. The email concerned a student for whom the grievor was responsible. He was suspected of selling drugs in the school and was supposed to leave the premises at noon on a bus provided for coop students. On December 10, the grievor saw this student in the school during the afternoon and spoke to Mr. Vecchio. Ms. Michail testified she proposed emailing the coop teachers, asking them to ensure the student left on the noon bus, and the principal approved this proposal. Based on her investigation, Ms. Hewitt concluded Mr. Vecchio did endorse the grievor's proposal to contact the coop teachers, even if he did not realize she intended to do so by email. This finding is not contested by the employer.

Later on December 11 Ms. Michail sent the following email to the coop teachers:

> Would it be possible for you to take attendance for [the student in question] in the Coop bus. He is supposed to leave school and Nick V. did catch him today in the afternoon and this is a nono. :-)))

The grievor copied this email to Mr. Sheardown and Mr. Vecchio.

Ms. McNally was the coop teacher responsible for the noon bus on December 10. She had marked the student in question as absent that day and had

informed the office. She was annoyed by the grievor's email because she viewed it as implying she had been derelict in carrying out her duties.

On December 11, Ms. McNally complained to Mr. Vecchio about the grievor's email. After interviewing all concerned, Ms. Hewitt concluded: Mr. Vecchio told Ms. McNally he understood why she was upset by the email being copied to him, but he failed to say he had approved Ms. Michail contacting the coop teachers. The employer does not contest this factual finding.

After speaking to Mr. Vecchio, Ms. McNally approached the grievor to complain about her email, repeating what Mr. Vecchio had said about understanding why she was upset. Ms. Michail could not understand why Mr. Vecchio had not told Ms. McNally that he had approved the grievor contacting the coop teachers.

Ms. Michail spoke to Ms. Bourke in her office and they invited Mr. Vecchio to join them. Ms. Michail asked why Ms. McNally had not been told the principal had approved of the grievor contacting coop teachers. Both the grievor and Ms. McNally testified the principal responded by yelling about his need for representation and about being sick and tired of being dragged into disputes about emails. According to Ms. Bourke, she pointed her finger at him and told him to lower his voice. Roberta Mazzariol, whose office was two doors away, also testified about hearing the principal yelling in an angry tone that day. Ms. Hewitt concluded the principal 'became angry" and "raised his voice" when speaking to the grievor, even though he denied doing so. This is another finding not contested by the employer.

After the first meeting in Ms. Bourke's office on December 11, Mr. Vecchio left and returned with Ms. McNally. He told Ms. McNally and the grievor to "work it out" and left. As he was leaving, the grievor placed her hand on his arm,

imploring him to stay. Both the grievor and Ms. Bourke testified he brushed his arm with his hand, saying "excuse me."

Ms. Michail did not work on December 12 or 13, 2012, as a result of her interactions with the principal on December 11. On December 12 she emailed Shelly Malone about the events of December 11. Without naming Mr. Vecchio or Ms. McNally, the grievor recounted: (1) "a condescending response to a request with a physical touch"; (2) an email correspondence being criticized coupled with an allegation of ulterior motivation; and (3) "a dramatic loud reactive exchange." The grievor testified about later telling her union representative that Mr. Vecchio had tapped her temples and yelled at her, but the date of this communication was not specified.

Also on December 12, there was an exchange of emails between the grievor and Amy Davis. The grievor reported not being well enough to work and Ms. Davis responded with condolences. The grievor's next email described Ms. Davis as "precious" and went on to mention "ongoing difficulties at work" without offering any details. Ms. Davis replied:

> I am not sure what happened but I want you to remember our previous conversations about: 1) questioning assumptions; 2) reactions vs. severity of the situation; 3) conflict vs. personal attack (what seems like personal attack is often just conflicting ideas); and finally 4) that we can't control how people act, we can only control how we respond.

Mr. Vecchio subsequently gave conflicting accounts of the coop bus incident. In an email to Amy Davis, dated December 14, 2012, he admitted both accepting the grievor's offer to contact the co-op teachers and telling Ms. McNally that he understood why she was upset by the grievor's email. He described the grievor as "upset" and said she had "placed her hand" on his elbow. In an email to Ms. Bedek, sent on May 10, 2013 after the grievance had been filed, the principal omitted his earlier admissions. He described the grievor as "angry" and said she

had “grabbed” his forearm. He also accused her of asking him to swear on the bible. He went on to say he had “learned a lesson” about taking the high road by not filing a harassment complaint against her in relation to this incident. The principal attached to this email an undated statement from Ms. McNally saying the grievor had been yelling and had grabbed Mr. Vecchio’s arm, thereby causing Ms. McNally to fear for her own safety.

In response to Mr. Vecchio’s email of December 14, Ms. Davis wrote later the same day:

> You poor man…. Ok—so again … the situation that occurred in your “meeting” did not match the severity of the situation … I suspect it is largely related to the workplace dynamics/conflict … bad news is you still need to manage those … Again, in my opinion … you begin to do that by setting expectations and/or creating a paper trail…

There is no evidence Ms. Davis at this stage knew anything about the temple tapping incident. She had received only Mr. Vecchio’s version of the coop bus fracas.

Ms. Malone and Amy Davis together visited Ms. Michail on December 21, saying they wanted to wish her a merry Christmas. Without telling the grievor, they had already arranged for Mr. Vecchio to drop by her office during their visit. The grievor testified about what happened after he appeared. He praised her and stated he was not mad at her or Ms. McNally. The grievor did not say anything to Mr. Vecchio or make eye contact with him. He then left. After the principal had gone, Ms. Davis and Ms. Malone both suggested the grievor had been ungracious by not accepting his apology. When she replied that he had not apologized, they said he had extended an olive branch. At some point in this meeting, Ms. Davis asked the grievor if she wanted to be right or healthy. The grievor replied it wasn’t a matter of being right or healthy but rather a matter of being able to work free of harassment. At some point, the grievor demonstrated for them how the principal

had tapped her temples, crying as she did so. Amy Davis said she was worried about the grievor, because she was still crying about something that had happened 10 days ago, and asked if the grievor would like to go on LTD. It is unclear from the grievor's testimony whether Ms. Davis comment about being healthy or right was made before or after the grievor mentioned Mr. Vecchio had tapped her temples.

As to whether Mr. Vecchio did apologize on December 21, Ms. Hewitt concluded he "did not apologize for his misconduct on December 11, 2012 but simply apologized if Ms. Michail felt that he was angry at her."

Ms. Michail testified the events of December left her too unwell to spend the Christmas break in Egypt as she had planned. As a result, she "lost a business class ticket."

On January 4, 2013 Ms. Michail sent an email to Amy Davis and copied Maureen Bedek. The relevant part of the email states:

> However, I remain concerned about Mr.Vecchio's conduct of Tuesday December 11, 2012:
>
> - tapping his index fingers on my temples repeatedly
> - unjustified criticism for email that he asked me to send
> - yelling and screaming, moving and waving his arms, not allowing me to express my concerns by shouting over me
>
> I appreciate Mr. Vecchio stopping by during your visit, complementing and praising my work and initiatives. He yelled and screamed at me and yet 10 days later his apology was "I am not mad at Myriam …" which was viewed as extending an olive branch. Nevertheless, I remain concerned about his behavior and reactions that were neither addressed nor acknowledged as inappropriate in a healthy work environment. …
>
> I am requesting a written commitment by Mr. Vecchio that he will treat me with dignity and respect and not resort to yelling and screaming or other harassing actions. I do reserve my right to file a grievance and link it to the

> current open cases since it's all a continuation of the same harassing behavior.
>
> As to the choice given to me by Amy, between being health and being right: This is not about being right or being wrong. But about a healthy work environment free of harassment, that respects my right to be treated with fairness and dignity.

Ms. Bedek forwarded this email to Karin Kristoferson on January 6.

Another incident cited by Ms. Michail occurred on January 10, 2013 when she was meeting with Mr. Sheardown, Mr. Lucier and the attendance counsellor, Megan Boast, about a student. The grievor testified she began to tell the attendance counsellor the student's mental health issues were compounded by a history of violence and drug use. According to the grievor's testimony, Mr. Lucier twice pushed her arm and said "you told me not to worry." (The grievor demonstrated a relatively hard push when testifying.) She testified Mr. Lucier then "engaged with Mr. Sheardown" about worrying and losing sleep and both of them laughed. The grievor provided no other details as to what Mr. Sheardown said or did when "engaged" by Mr. Lucier. She denied ever telling Mr. Lucier not to worry but she did mention an earlier occasion when she had said she was no longer worried about this student.

According to Ms. Hewitt's report, when the grievor was earlier interviewed in the summer of 2013 about the meeting on January 10, she reported that Mr. Lucier had "nudged" her arm.

On January 23, Ms. Boast arranged a meeting for the next day about another student, who was assigned to Ms. Michail as guidance counsellor. Ms. Boast emailed Mr. Sheardown and a learning services teacher, Hanna Krzeminska, asking them to notify others who should attend. Ms. Krzeminska invited Mr. Lucier. No one invited Ms. Michail. On January 24 the grievor emailed Mr.

Sheardown and three others, not including Ms. Boast, inquiring if a meeting about this student was planned. She received no reply before the meeting took place and the meeting occurred in her absence.

Ms. Bourke followed up with an email to Mr. Sheardown, Mr. Lucier and Ms. Boast, saying the grievor should have been invited to the meeting, and copying the email to the grievor and Mr. Vecchio. There were then a series of emails, all with the same distribution list. Mr. Lucier replied to Ms. Bourke: "I'm sorry but I did not see Myriam's email until after the meeting." Mr. Sheardown also replied to Ms. Bourke, saying he had gone to the grievor's office immediately after her email to say he had hoped to attend the meeting but was unable to get there in time. The grievor then replied to Mr. Sheardown:

> I respectfully disagree with your statement that you came to my office immediately in person as you did not come to my office at all today. Later in the day, when I came to your office …, I asked whether there was a meeting and you answered that you did not know about it.

At this point Megan Boast joined in, expressing a desire to "stop this email train." She apologized to the grievor for not contacting her directly about the meeting, saying she often made mistakes about which teachers are responsible for a particular student.

Later the same day Mr. Sheardown prepared a draft email to Ms. Michail. He forwarded it to Ms. Davis and Mr. Vecchio for their review but never sent it to the grievor. In the draft, Mr. Sheardown stated he had spoken to the grievor immediately after reading her email, not immediately after it was sent. He suggested they "agree to disagree" about whether they spoke in his office of hers. The vice-principal also reiterated that he had not attended the meeting.

It would appear the events on January 24 came to the attention of Karin Kristoferson in human resources. When interviewed by the investigator, Ms.

Kristoferson stated it had become apparent by January 25 that some "intervention" was required.

Ms. Michail testified about two incidents involving Shannon Askew. This testimony was preceded by general comments about Ms. Askew that were highly critical. The grievor accused the guidance secretary of spending "half her time" in the main office, "socializing" with other secretaries, and not providing guidance counsellors with the support they should get. This criticism appears on its face to be greatly exaggerated. Ms. Michal also accused the guidance secretary of giving her a hard time but provided no specifics other than the two incidents recounted below. Patricia Bourke testified Ms. Askew provided less support to the grievor than to other counsellors, but the only example given by the acting department head was the grievor having to make repeated requests of the secretary to obtain a form, an apparent reference to one of the two incidents described below. According to Roberta Mazzariol, Ms. Askew assisted the other counsellors by putting a notice on their doors when they were absent but she did not do the same for the grievor. There is no evidence as to whether the others requested this assistance or as to whether the grievor neglected to make such a request. Taken as a whole, the evidence falls short of proving Ms. Askew failed to provide support to the grievor other than on two occasions.

On January 28 the guidance secretary did fail to properly prepare materials required by the grievor for an elementary school visit. The grievor reported this problem to Patricia Bourke and Ms. Bourke spoke to Ms. Askew. At the beginning of the day on January 30, Ms. Askew emailed an apology to the grievor, saying she was "very sorry" for not giving her the same level of support as other counsellors in relation to school visits. Ms. Askew provided a copy of this apology to Mr. Vecchio who forwarded it to Ms. Davis with the following comment:

> Here's an example of the subtle "intimidation" that the folks are feeling in this building. I would respectfully submit if this was any other staff member the guidance secretary would not cc the principal. Everybody is walking on pins and needles here.

The grievor's second complaint about Ms. Askew relates to what happened in relation to a form required by a student in order to enroll in a night school program at Fanshaw College. The student needed the form for an appointment at the college on January 29.The grievor testified she had asked Ms. Askew to provide this form more than once. On the evening of January 28, Ms. Michail emailed Ms. Ask asking if there was any news about the form. At 8:26 a.m. on January 29 Ms. Askew emailed the grievor, saying the form was on her office chair. At this stage the form had been signed by the principal but still needed to have information added by the grievor. The student arrived at the guidance office that day before the grievor had reported for work. Ms. Askew told him to attend the scheduled meeting at Fanshaw College, saying she would fax the completed form to the college as soon as Ms. Michail arrived. Ms. Askew confirmed this arrangement in an email sent to Fanshaw College at 9:00 a.m.

When the grievor arrived at work shortly after 9:00 on January 29, Ms. Askew did not tell her about what had already transpired that day. Ms. Askew belatedly emailed Ms. Michail on the morning of January 30, bringing her up to date. Ms. Michail was upset by this communication for two reasons: she felt the email to Fanshaw College reflected poorly on her; and the form had not been provided to the student in advance of his scheduled appointment at the college.

After receiving Ms. Askew's email, the grievor immediately went to see her in the main office where she was working. (This occurred just two hours after Ms. Askew had apologized for not providing adequate support in relation to school visits.) Ms. Michail testified she "challenged" Ms. Askew to explain her conduct,

speaking in a low voice to avoid being overheard by others present, “shaking” as she did so.

In an email to Mr. Vecchio dated January 30, Ms. Askew reported the grievor had “confronted her” in the main office, making her feel “so uncomfortable.” The next day Mr. Vecchio sent an email to Amy Davis, copied to Mr. DeDecker, accusing the grievor of “accosting” and “attacking” the guidance secretary.

On January 30, Ms. Askew emailed her CUPE representative about the incident in the front office, saying the principal had advised her to seek union representation. Ms. Askew eventually filed a formal complaint, dated February 23, alleging she had been harassed by Ms. Michail on January 30. Mr. Vecchio’s signature appears on the complaint form in the space designated for the name of “principal/supervisor.”

At the end of the day on January 30, Karin Kristoferson emailed Nick Vecchio about “further developments today.” She offered support in dealing with a “very difficult environment.” A copy of this email was sent to Ed DeDecker and Maureen Bedek. When interviewed by the investigator, Ms. Kristoferson described the events of January 30 as the final straw. She told the investigator that Mr. Vecchio was getting other “complaints” about the grievor and reporting “performance concerns.” Ms. Kristoferson also offered her opinion that the grievor was “not the victim.”

In an email to Mr. Vecchio, sent on January 31, Ms. Davis stated: “Karin and I just spoke to Ed and we will organizing support for you guys … this needs intervention involving senior leaders.

Ms. Bedek visited RMC on February 1 to lead a meeting of guidance and learning services staff on effective communication which included a discussion of problems caused when emails are widely distributed or misinterpreted.

On February 11 a group of management representatives met to discuss issues relating to the grievor's performance. The meeting was attended by: Rick Sheardown, Nick Vecchio, Maureen Bedek, Amy Davis and Karin Kristoferson. Also in attendance was Chris White who was then employer counsel.

Also on February 11, Collette McNally emailed the principal about an unnamed "person" who appears to be the grievor. The relevant email chain began with an email from Ms. Michail to Ms. McNally, Ms. Mahon and Ms. Krzeminska, asking if they are "ok" with something. Ms. Krzeminska replied in the affirmative, thanking Ms. McNally for her "creative thinking." Ms. McNally then forwarded the preceding two emails to Mr. Vecchio, adding the following comment: "Also add that the person interrupts others in order to get their point across, but is unwilling to listen to any other input." Mr. Vecchio replied to Ms. McNally: "Thx … mom's the word."

In an email to Ms. Michail, dated February 12, Ms. Kristoferson addressed the grievor's concerns about Mr. Vecchio as summarized in the email she had sent to Ms. Bedek on January 4:

> Amy Davis did forward along your email of January 4, 2013 and, while it has been some time since it was sent, I want to assure you that the issues raised have been the subject of careful consideration by the Board in the subsequent period. I understand that your email is a follow-up to a meeting which took place on December 21, 2012 between you, Shelly Malone, Amy and, for a portion of the meeting, Nick Vecchio. …
>
> Turning to the situation which was the subject of the December 21, 2012 meeting, the Board has taken note of the concerns that you have expressed and they have been communicated to Mr. Vecchio. I can also advise you that it is the Board's expectation that you will be treated respectfully by all its employees, including Mr. Vecchio. That is a commitment which the Board is able to provide to you and it is consistent with the Board's expectations of all employees.

> Having said all that, I do think Mr. Vecchio's statements to you on December 21 are important. I am advised that he apologized to you for the exchange on December 11, 2012, provided you with an explanation for his actions and reiterated his appreciation for you as a teacher and as a person. Implicit in all that was his commitment to a positive and professional relationship with you in future. If you believe Mr. Vecchio falls below that standard in his future dealings with you, please let me know and we will respond to the circumstances at that time.

On February 13, Mr. Sheardown made an inquiry about a concern expressed by Kimberly Lajoie, the school chaplain, a couple of weeks earlier relating to a student complaint about something Ms. Michail had said about his "lifestyle." Mr. Sheardown inquired whether the grievor's comment related to the student's sexual orientation. Ms. Lajoie replied in the negative, saying the grievor had counselled the student to attend night school even though doing so would entail quitting a job and adopting a more modest lifestyle.

Also on February 13, Mr. Vecchio notified Ms. Michail of a meeting to be held at the board headquarters the next day to address concerns about her performance. Her request to be notified in advance of the meeting as to the nature of these concerns was denied. Shortly before the meeting commenced on February 14, Ms. Kristoferson emailed Mr. Vecchio a detailed description of these performance issues. The meeting lasted approximately three-quarters of an hour. The grievor was accompanied by Shelley Malone and Sheila Brescia as union representatives. Minutes of the meeting were taken by Karin Kristoferson on behalf of the employer and Shelley Malone on behalf of the union. The eight concerns raised by Mr. Vecchio at the meeting were subsequently summarized in a letter to the grievor dated February 19. The grievor provided a detailed response to these concerns in a long memorandum, provided to the employer on June 3, and supported by copious documentation. The performance issues addressed at this meeting are described in the next section of this award.

In the aftermath of the meeting on February 14, Ms. Michail was off work until February 21. The grievor saw her psychologist and her family doctor before returning to work. Ms. Bourke testified that on February 16, Mr. Sheardown stated he intended to ask Marcela Kartye to replace the grievor. Ms. Bourke testified she knew of no precedent for the replacement of a guidance counsellor during a short-term absence, saying Sandra Chavelier-Fell had not been replaced when she was absent for six or eight weeks.

One of the issues raised by Mr. Vecchio at the February 14 meeting related to emails sent by the grievor to a colleague and copied to others. She requested to see the emails in question. Apparently in response to this request, Rod Lucier on February 15 forwarded to Mr. Vecchio emails received from the grievor during the preceding December. One of the forwarded emails, reminding Mr. Lucier to follow-up on a credit rescue issue, had been copied to Mr. Sheardown and the teacher in charge of credit recovery. In his covering email to the principal, Mr. Lucier noted he had been "publicly nudged" by the grievor to follow up. In another of the emails forwarded to the principal by Rod Lucier on February 15, the grievor refused Mr. Lucier's request for assistance with what he described as an "urgent" matter when he was not on site. Ms. Michail testified she in fact assisted Mr. Lucier after he asked a second time.

Ms. Michail also complained about being excluded from the activities of a committee overseeing masses conducted by a priest in the school chapel. The grievor initially suggested masses be held and they were organized by a committee of three: the grievor; Kimberley Lajoie, the school chaplain; and Mary Bechberger, the head of the religion department. The grievor testified her exclusion from the committee began slowly in late February and escalated from there.

In cross-examination, the grievor conceded there had been a disagreement between her and the two other committee members about whether some scheduled

masses should be cancelled. The grievor testified Ms. Bechberger "raised" her voice during a discussion of this matter. Asked about a committee meeting in May, the grievor initially replied she had not been invited. Shown an email from Ms. Bechberger saying the grievor was "welcome to join" the meeting, the grievor noted the email was sent less than two hours before the meeting, but she conceded being able to attend even on short notice. Her contemporaneous reply to the email invitation stated she would not be attending because she had been excluded from "all communications." No details of any such communications were entered in evidence. The grievor was also asked in cross-examination if some teachers had objected to classes being cancelled as a result of masses. She responded: "They cannot just say it's interrupting their classes. They need to tell me how it is interrupting their classes."

When testifying Ms. Michail claimed most of the staff members who treated her badly acted as "one group." That group was said to be comprised of Nick Vecchio, Rick Sheardown, Rod Lucier, Colette McNally, Shannon Askew and Barb Mahon.

According to the grievor, Mr. Sheardown and Mr. Lucier were friends, as were Ms. McNally and Ms. Askew as well as Mr. Vecchio and Ms. McNally. The grievor testified the friendship between Mr. Vecchio and Ms. McNally entailed socializing outside of work. Ms. Bourke corroborated the grievor's testimony about Mr. Vecchio and Ms. McNally and also about Mr. Sheardown and Mr. Lucier. The acting department head also testified that Mr. Vecchio and Mr. Sheardown were on friendly terms.

In relation to Ms. McNally and Ms. Askew, the grievor testified they sometimes stopped talking when she approached them, leading her to infer they had been talking about her. The grievor complained that on other occasions they

continued to talk when she approached, making her wait to address the subject on her mind.

Ms. Mazzariol testified Collette McNally said she did not intend to help the grievor learn the role of guidance counsellor because she did not deserve to be in guidance.

The grievor was asked in cross-examination if there was anything she should have done differently during the school year. She replied she had asked herself this question and could think of nothing.

Ms. Bourke testified the grievor had a very positive and supportive relationship with the students for whom she was responsible. The acting department head offered a "very positive" assessment of the grievor's performance as a guidance counsellor during the 2012-13 school year. The grievor's most recent performance appraisal was completed in 2009 when she was teaching French. Her then principal described the grievor as "very collegial" and went on to state: "She has always been very diligent in her work, caring with the students and a pleasure to have as a colleague."

Performance Concerns

Mr. Vecchio raised eight performance issues at the meeting on February 14. Two of them related to Ms. Michail's interaction with other employees. The first such concern was the incident involving Shannon Askew in the front office on January 30. Mr. Vecchio alleged the grievor had invaded the secretary's personal space in an intimidating manner. As noted in the Hewitt Report, Mr. Vecchio reached this conclusion before affording the grievor an opportunity to provide her account of the incident in question.

The other staff matter addressed at the February 14 meeting concerned emails allegedly sent by the grievor to multiple recipients. The principal stated emails relating to one staff member should not be copied to others. The grievor was accused of contributing to a negative work environment by sending global emails. Rod Lucier and Barb Mahon were identified as having "approached" the principal about this matter. Mr. Vecchio mentioned a "global" email sent by the grievor about a mistake Mr. Lucier had made. Ms. Malone asked to see a copy of this email but neither it nor any other emails were provided at the time or during the ensuing weeks. In his letter of February 19, Mr. Vecchio conceded the emails in question were not negative. Nonetheless, he maintained that the staff members who were the subject of the grievor's emails felt they were being called into question in front of their peers and administrators to whom the emails were copied. He suggested the grievor communicate with her peers face-to-face in future.

The grievor subsequently asked Mr. Lucier and Ms. Mahon about the "adverse reports" they made to Mr. Vecchio. In an email dated March 6, Mr. Lucier replied: "Nick asked me about an email that you copied to a number of members of the Student Success Team." On March 25, Ms. Mahon wrote: "I never lodged a complaint. I simply shared some concerns that I thought needed to be shared.

The remaining six issues addressed by Mr. Vecchio on February 14 concerned Ms. Michail's dealings with students or parents. Mr. Vecchio reported two parents had recently lodged complaints about the grievor. One complained to the principal that her daughter had received no support in relation to post-secondary opportunities in the US and had been yelled at when she asked to make a course change.

In relation to the course change, Ms. Michail testified this student came to her office without an appointment when others were already waiting. When asked

to make an appointment, the student refused to do so. The grievor admitted she had then raised her voice to an "assertive level" when telling the student to leave. According to the grievor's uncontradicted testimony, of all of the concerns discussed at the meeting on February 14, this was the only one brought to her attention before the meeting. As to American universities, the grievor testified about giving this student a thirty-page package about post-secondary education in the United States, including information on SAT testing. This package was provided to the student at the end of the previous school year. In a memorandum dated March 3, 2013, Patricia Bourke summarized what guidance counsellors at RMC normally do for students wanting to study in the United States:

> We tell students they will need to contact the institutions they are interested in applying to and get the information they need about their application process. We show the student the College Board website which will be their link to writing the SAT or any other test that may be required by these institutions. We tell them we will provide any school documents that the institution may require. That is all we have ever done.

Ms. Bourke testified she had described this practice to Mr. Vecchio, before the February 14 meeting, in response to an inquiry from him.

Another parent initially telephoned Mr. Sheardown and then, at his suggestion, provided additional details in an email that he forwarded to the principal. This parent reported the grievor had recently cancelled a meeting about her son's application to Fanshaw College, saying to "go on line" to obtain information. This parent also reported her son was erroneously told in June of 2012 that he lacked the credits required to graduate. The grievor corrected this mistake, but not until the day of graduation. At that stage, she had only one semester of experience working in guidance.

Ms. Michail testified she was not the person who had initially said this student lacked the credits to graduate. She speculated this message had been

delivered by the English teacher whose course he had failed. Upon reviewing the failure list, the grievor noticed he had successfully completed a literacy course which qualified him for graduation. She conceded it may have been an "oversight" on her part not to correct the error before graduation day. As to providing support for an application to Fanshaw College, the grievor testified the parent wanted to meet during the first week of the second semester, after the deadline for college applications had already passed, and during the busiest time for guidance counsellors. Ms. Bourke testified counsellors are very busy in the first two weeks of the second semester.

Mr. Vecchio on February 14 also recounted a report received from a social worker alleging Ms. Michail had told a student, if she was on an admissions panel for a post-secondary institution, she would reject the student's application because her marks were so low. Acknowledging the student's marks did not merit admission, the principal said he was concerned about the way the grievor had delivered this message.

Ms. Michail testified this student was "smart" but in the habit of skipping classes. Her attendance record shows 155 absences during the 2012-13 school year, 103 of them "unexcused." The grievor admitted telling this student she would not qualify for post-secondary based on her current marks, in an effort to persuade her to work harder.

At the meeting on February 14 Mr. Vecchio also mentioned a meeting on February 4, about timetable changes for a student over 18 years old, attended by the grievor and the student's grandmother but not the student himself.

Ms. Michail testified that in October of 2012, when this student was already 18, she had been asked by Mr. Sheardown to meet with the grandmother. Ms. Bourke testified that she saw Mr. Sheardown escort the grandmother to the

grievor's office. There is no evidence that Mr. Sheardown suggested there should be discussion about the student in his absence.

Mr. Vecchio also took the grievor to task for telling the parents of another student on February 6 that she would try to get him admitted to an aeronautics program at another school. This statement was made at a meeting on February 6 attended by Mr. Sheardown. Teachers responsible for learning services later told the vice-principal this student was not suited for the program because he had difficulty with math. Mr. Vecchio criticized the grievor for failing to consult with colleagues who were familiar with the student's abilities. Evidence led by the association shows there is no math pre-requisites for admission to the program.

The remaining two issues raised on February 14 related to the manner in which Ms. Michail conducted meetings with students in her office. Mr. Vecchio reported that some students had expressed concern on twitter about meeting with the grievor with the fluorescent lights turned off. He suggested the lights should be on. He also criticized the grievor's practice of sitting beside a student when the two of them were reviewing something on the computer.

Ms. Michail testified she asked for a printout of the twitter comments but never received it. She described her office as having a window measuring 52 by 57 inches with a south-east exposure. She did not turn on the lights unless it was cloudy. The grievor also testified about being trained by the head of guidance at another school to sit beside a student when using a computer. Ms. Bourke testified this is a common sitting arrangement. The acting head of guidance also testified she had observed no problem with lighting in the grievor's office, the door to which was always open.

Ms. Michail subsequently provided a doctor's note indicating she was sensitive to florescent lights. In an email to Maureen Bedek and Karin Kristoferson, dated February 21, Ms. Davis described the doctors' note as the

grievor's "return serve" to being criticized for "being in the dark with students." Ms. Davis subsequently arranged for alternative lighting. In an email to Mr. Vecchio and Mr. Sheardown, dated April 3, she wrote:

> 9 years of post-secondary education and what do I have to show for it? A glamorous and important job of purchasing … floor lamps for people in pursuit of wellness … this job takes me to exotic places like Walmart.

Superintendent DeDecker

Superintendent Ed DeDecker was called as a witness by the employer to testify about what steps, if any, the employer took in the fall of 2013 in relation to disciplining Mr. Sheardown and Mr. Vecchio, based on my first award and the Hewitt report respectively. During cross-examination, Mr. DeDecker was also asked about his dealings with the school administration and human resource staff in relation to the grievor before the Hewitt investigation.

Ms. Hewitt's report was delivered to the employer in early September of 2013. Mr. DeDecker and Maureen Bedek presented the Hewitt report to Mr. Vecchio when they met with him on October 2, asking him to read it and provide his response at a later date. Mr. DeDecker testified Mr. Vecchio was "contrite." Mr. DeDecker met again with Mr. Vecchio on October 23 after he had read the Hewitt report. The superintendent testified the principal indicated he was embarrassed for letting his employer down by not making better choices. Ms. Bedek's very brief note of the first meeting makes no mention of anything the principal might have said. Mr. DeDecker took no notes of either meeting.

In a letter to Mr. Vecchio, dated November 5, Mr. DeDecker referred to the Hewitt report and then stated:

> The board acknowledges the complexity of the role of Principal and the difficulty of dealing with emotionally charged situations on a regular basis

> Notwithstanding the above, the investigation made specific conclusions about meetings and conversations involving you, Mrs. M. Michail and others that included a condescending tone, lack of judgment and an inability to effectively communicate and resolve concerns brought forward by Myriam.
>
> The board has an obligation under regulations and set policy with regards to Workplace Violence and Harassment Prevention. As the board's representative, there is an expectation you will not only communicate the principle of the policy but to uphold its spirit and interest.
>
> The situation has been thoroughly discussed with you as well as attention given to a review of the policy. You have been offered the opportunity to be provided with additional supports with regard to this policy and encouraged to enroll in the Emotional Intelligence course provided by the board.
>
> We trust these supports will assist you in meeting the board's expectations in providing an environment free of harassment and discrimination in the future.

This letter fails to mention several adverse findings contained in the Hewitt report: Mr. Vecchio tapped Ms. Michail's temples, while making a condescending comment; he repeatedly denied doing so; he yelled at her in anger during the discussion of her email about the coop bus; and he failed to make any inquiries of her before concluding she had intimidated Shannon Askew in the main office. In cross-examination, Mr. DeDecker conceded his letter could have been "much more strongly worded."

Acknowledging he had been copied on some emails about the grievor in early 2013 and had received some additional updates at that stage, Mr. DeDecker testified he did not then view the situation as requiring his attention. Asked if he decided to "sit it out," leaving the matter to the school administration and human resources, he answered in the affirmative, adding in hindsight he regretted doing so. This answer was not challenged in cross-examination. In the absence of any evidence contradicting Mr. DeDecker's account of his very limited involvement

during the early months of 2013, I see no reason not to accept his testimony as true.

Medical Reports

Ms. Michail has been under the care of a psychologist since March of 2010 in relation to difficulties experienced at work and elsewhere.

In a letter dated May 15, 2012, Dr. Reist described the harm caused to the grievor by events occurring in the 2010-11 and 2011-12 school years. This letter was in the employer's possession before the events giving rise to this grievance. The relevant parts of the letter are quoted in my first award.

Dr. Reist addressed the grievor's experience during the 2012-13 school year in a report dated October 2, 2013. The psychologist noted the grievor first expressed concerns during treatment sessions in August and September:

> In particular, she discussed feeling overwhelmed that she was assigned another guidance counselor's alpha list of students in addition to her own. She also expres*sed distress related to negative encounters with several co-workers in which* her concerns about students or ideas were minimized, dismissed or met with negative reactions. … She became increasingly upset, reported feeling overwhelmed and exhausted and noted her vasovagal symptoms of dizziness and fatigue had intensified. … She began to experience hypervigilance about her job performance which increased her anxiety.

Turning to the grievor's interaction with Messrs. Lucier and Sheardown at the student success meeting on November 28, 2012, Dr. Reist described the grievor's reaction:

> This incident caused her to feel humiliated and she became increasingly despondent and tearful during treatment sessions. She also began experiencing intrusive distressing memories of what was said to her along

> with psychological distress and physiological reactivity whenever she thought about or discussed the incident.

Dr. Reist saw the grievor on December 11, 2012 in relation to her interactions with Mr. Vecchio that day. The psychologist wrote:

> During her therapy session, Ms. Michail processed humiliated and distressed at being treated as if though she was a child. She also discussed feeling violated by the fact the principal had touched her in such an insulting manner. In addition, she acknowledged that she did not feel safe around her principal and was guarded and hypervigilant whenever she was around him. Her distress at this incident was such that she contemplated if she could return to work since she was fearful of possible negative future encounters with her principal.

As to the grievor's meeting with Amy Davis and Shelley Malone of December 21, 2012, Dr. Reist wrote:

> Unfortunately, the outcome of this meeting compounded her distress. Indeed, she subsequently presented in her therapy sessions as tearful, dejected, demoralized, and fearful. She reported that her goal of the ongoing harassment ceasing and of her principal's actions being held accountable did not occur. Moreover, given the response of her HR and Union she was increasingly fearful that she would not be protected and thus subject to future harassment.

The psychiatrist's report indicates the grievor's "post-traumatic symptoms remained elevated" as a result of the meeting on January 10.

Dr. Reist saw the grievor on February 18, 2013, four days after the meeting about performance issues, and subsequently wrote:

> [H]er psychological symptoms had again significantly exacerbated. Her appearance was slightly disheveled, she appeared highly fatigued, she frequently cried throughout the session, and she was physically agitated. She also reported that she had only minimally slept and ate, could not stop thinking about what had occurred on February 14, 2013, and felt sick, weak, and faint. …She also felt overwhelmed by her intrusive memories of the meeting and its sequelae, struggled with sleep, energy, and concentration difficulties, continued to feel weak, dizzy, and tearful, experienced a

> significantly reduced stress tolerance, and endorsed feelings of helplessness and hopelessness of the harassment experiences never ceasing. Furthermore, Ms. Michail began to develop panic attacks whenever she was in the presence of her principal due to her fear that he might try to use anything she said or did against her. Her fear of being incriminated and of the harassment never ceasing became so consuming that she struggled to focus on other issues it impacted her thoughts, dreams, judgments and decisions, and she struggled to focus on other issues and other activities of daily living. She also reduced socializing, appeared timid and fearful in her treatment sessions, and acknowledged struggling daily tasks and stresses.

Professor Westhues on Mobbing

Professor Kenneth Westhues was called by the association as an expert witness to testify about workplace mobbing as a social and sociological phenomenon. He offered the following definition of such mobbing:

> When normal activities are set aside and they [i.e. co-workers and perhaps also mangers] come together to speak with one voice for the elimination of one of their number, an expression of collective hostility targeted on one person toward the end of removing that person from the workplace.

Professor Westhues has developed a checklist of indicators of mobbing to be used as heuristic device. The most important indicator is that the target is seen as personally abhorrent with no redeeming qualities. Mobbing entails collective action but the motivations of those doing the mobbing may be different. Members of a mob may be encouraged by a perception that management wants to get rid of someone. The early stages of mobbing can be defined by small incidents and petty harassments that become more significant once there is evidence of some formal action against the target. The fact co-workers know a manager would welcome criticism of a particular individual would suggest such criticism was an element of mobbing.

SUPPRESSION OF EVIDENCE

A vast number of emails and other documents were provided to the association by the employer in the course of this proceeding. The association contends additional emails and other documents were suppressed in an attempt to conceal evidence.

The association asks me to infer the following documents, relating to the events giving rise to the grievance must exist even though they were not produced by the employer:

- notes of Administrative Council meetings
- emails or notes of other communications between Superintendent DeDecker and Mr. Vecchio, Mr. Sheardown or Ms. Kristoferson
- notes of meetings or telephone calls prepared by Karin Kristoferson, Ed DeDecker, Nick Vecchio or Rick Sheardown

I was asked to draw a negative inference based on the non-production of these documents.

I decline to draw any such inference. There is no evidence suggesting the events giving rise to this grievance were discussed at a meeting of administrative council and I see no basis for inferring such discussions must have occurred at that level. Mr. DeDecker denied taking an active role in this matter prior to the issuance of the Hewitt report and I have already concluded his denial is credible. Accordingly, I do not infer he sent or received emails or participated in telephone calls about the grievor. As to notes of telephone calls involving others, in the age of email I am not prepared to infer any such calls occurred. There is evidence of two meetings. A meeting was held on February 11, 2013 relating to performance concerns. Ms. Kristofferson's notes of that meeting were produced. I see no reason to infer others also took notes at that meeting. Another meeting occurred on March 25, 2014 to discuss the decision not to call Mr. Vecchio as a witness. Any notes of

that meeting would attract litigation privilege. I see no reason to infer there were additional meetings concerning the events giving rise to the grievance.

The association also asked me to infer there must be notes relating to Karin Kristoferson's investigation of the grievor's complaint which the human resources officer claimed to have carefully considered. In my view, the evidence indicates it is likely Ms. Kristoferson failed to conduct the type of meaningful investigation that would have required note taking. Her failure to do so is addressed below.

With respect to some emails that were eventually produced, the association contends the sender or receiver initially attempted to suppress them. The emails in question are listed in the association's written argument:

- Mr. Vecchio's email to Amy Davis, dated December 14, 2012, describing the coop bus incident on December 11, mentioned above
- Mr. Vecchio's email to Ms. McNally and her email to him about "that person", both dated December 11, 2012, described above
- Mr. Lucier's emails to Mr. Vecchio, dated February 15, 2012, criticizing the grievor, described above
- Shannon Askew's email to her CUPE representative, dated January 30, 2013, saying her principal had advised her to seek union representation, described above
- an email sent by Karin Kristoferson to Ms. Hewitt, dated August 30, 2013, stating Mr. Vecchio stated the grievor had grabbed his arm on December 11, 2012 and reporting she had not made a note of his statement.
- an email from Amy Davis to Ms. Hewitt, dated August 30, 2013, indicating on December 21, 2012 she did ask the grievor if she wanted to be healthy or right

None of these emails were provided to the association by the sender or recipient. Rather, they were supplied either by Ms. Hewitt, who had received them during the course of her investigation, or by the employer's IT department in October of 2014 when it conducted a search of email accounts pursuant to the terms of a consent order. Most of these emails were provided only by Ms. Hewitt; some of Mr. Lucier's emails and Ms. Askew's email were uncovered only by the IT department; and the email exchange between Mr. Vecchio and Ms. McNally was supplied both by Ms. Hewitt and the IT department.

The association contends any email supplied by Ms. Hewitt, but not found by the IT search, must have been deleted by the sender and recipient, before the IT search was conducted, in a deliberate attempt to suppress evidence. (This contention does not apply to Ms. Hewitt or the CUPE representative as an email recipient.) The association's argument rests upon the tacit assumption that the IT search found all relevant emails still in existence. This assumption is called into question by an email, dated November 6, 2014, from IT supervisor Chris Dale to Ms. Bedek about a bug in Microsoft's search program. He wrote: "The bug will cause searches to time out and only return emails that have been found up until the point where the search timed out." Mr. Dale went on to say he had consulted Microsoft and been told about a "work around" that was "hit and miss" in its effectiveness. (Mr. Dale recommended that account holders be asked again to search their own email accounts. Ms. Bedek testified this was done.) Mr. Dale's email is hearsay. The association contends I should draw a negative inference from the fact he was not called as a witness. I decline to do so. As noted by employer counsel, the association bears the burden of proving emails were deliberately deleted and it could have called a computer expert to testify in support its tacit assumption of Microsoft software perfection. It elected not to do so. Based on the evidence at hand, indicating the search software is prone to failure, I am unable to

conclude account holders must have deleted emails provided by Ms. Hewitt but not found by the IT search.

Did account holders deliberately withhold emails when asked to search their own accounts? Mr. Vecchio, Ms. Kristoferson and Ms. Davis were asked three times asked to produce emails about the grievor, twice before the IT search and once after. Others were asked only after the IT search. There is no evidence of what search parameters, if any, OECTA suggested when it requested production, or what search parameters the employer directed account holders to use. A document prepared by Ms. Kristoferson indicates the IT department was asked to search for emails containing the terms "Michail" or "Myriam Michail." Logic indicates a search done with precisely these terms would not have caught emails referring only to "Myriam" as did all of the emails produced by Ms. Hewitt but not found by the IT search. Computer experts in the IT department might be expected to have reformulated the actual search terms so to avoid this problem. However, if the same search terms were provided to account holders, who have much less experience in such matters, they may not have spotted the problem. Moreover, as all but one of these emails referred to "Myriam" only in the text, and not in the subject line, subject-line only searches would not have found most of the emails in question. The association shoulders the burden of proving emails were deliberately withheld. Bearing in mind the complete lack of evidence about search parameters, I conclude the evidence falls short of proving those named by the association deliberately withheld emails.

This conclusion is buttressed by additional considerations in relation to Ms. Kristoferson and Ms. Davis. I do not see how the suppression of the email to Ms. Hewitt from Ms. Kristoferson, saying she could not find her note about Mr. Vecchio reporting the grievor had grabbed his arm, would have benefited its author, the employer or Mr. Vecchio, given Ms. Kristoferson's contention that Mr.

Vecchio made this statement was already recorded elsewhere. In my view, the acknowledgement of not being able to find the note has no probative significance. Likewise, there would be no obvious advantage to Ms. Davis, or to her employer, in suppressing her email offering an explanation for her comment about being healthy or right. When the grievor objected to this comment, in her email to Ms. Davis on January 4, 2014, Ms. Davis did not deny making it. If the comment was not denied, the explanation for it could not hurt Ms. Davis or the employer. Moreover, I think it unlikely Amy Davis or Karin Kristoferson would have attempted to suppress evidence in this proceeding after having given the very same evidence to Ms. Hewitt.

There was an obvious advantage to Mr. Vecchio in suppressing his email describing the events of December 11 relating to the coop bus, especially after the Hewitt report placed him in jeopardy, because this email was at odds with his later account of that day casting him in a much better light. Regardless of whether he deliberately withheld this email, his mendacity is proven by a simple comparison of these two conflicting accounts, his denial of head tapping, and his even more devious denial of being with the grievor on the occasion when the tapping occurred. Proof that he also tried to suppress an email would merely add a little more icing to the cake.

ABUSE OF PROCESS

The allegation about email deletion took on a life of its own resulting in an abuse of process motion. On March 24, 2015, the first day of argument, I asked if a protocol was in effect to automatically delete emails after a certain time lapse. The employer replied there was a default protocol that resulted in emails being automatically deleted after one year. (Ms. Bedek also noted she had instructed IT

to alter this default protocol for her own account so emails were never deleted.) The grievor responded that her email account contained emails older than one year even though she had never changed the default protocol.

The grievor's comment prompted Ms. Bedek to send the following email to IT: "Can you confirm that Myriam Michail is not on the email system, she was terminated in the fall." When IT confirmed the grievor still had an active account, Ms. Bedek sent a second email saying to terminate her access. Both of Ms. Bedek's emails were sent from the hearing room shortly after the grievor had described the contents of her mailbox. Neither the grievor nor the association was then told her access had been terminated.

Upon discovering she could no longer access her email account, the grievor called IT and was told human resources had given instructions to block her access. Association counsel immediately emailed employer counsel, protesting the termination of the grievor's access, noting the employer had previously agreed to allow her continued access. Immediately after the grievor's termination in October of 2013, the parties had agreed she would be allowed continued access to her email account for the purpose of the ongoing litigation. Ms. Bedek then instructed the IT department to allow the grievor to continue to access her email account but to terminate her access to other computer programs.

Association counsel's protest to the termination of email access elicited a prompt response from employer counsel, indicating the grievor's access had been terminated "in error" and was now restored, and offering apologies for "the confusion." Access was restored just over twenty-four hours after it had been terminated. A few days later Ms. Bedek emailed the grievor, offering an apology:

> I want to let you know that your email should not have been disabled and I take full responsibility for that error. I know that this process has been extremely painful and hard on you and I am truly sorry.

When the hearing resumed on April 2, Ms. Bedek stated the normal practice is to end email access when an employee is terminated, saying she had recently reviewed this protocol in early March in the context of the termination of another employee. Ms. Bedek went on to say she had terminated the grievor's email access on March 24 with this protocol in mind, having forgotten the earlier agreement between the parties. She described what she did as an "over-reaction."

For some time after March 24, the employer continued to assert emails were automatically deleted after one year under the default deletion protocol. This is what Ms. Bedek was told at the time by the IT supervisor, Chris Dale. This information was relayed to the association on March 30.

Counsel for the association immediately contested this assertion on two grounds: the grievor and other teachers had emails older than one year in their accounts; and the IT search in October of 2014 had produced emails from Mr. Vecchio's account that were then more than one year old. The association's concerns were relayed to Mr. Dale. He apparently made no effort to check the contents of teachers' emails accounts. He replied only in relation to Mr. Vecchio, saying there was a legal hold on his account, as of the summer of 2013, preventing deletions. This information was communicated to the association on March 31.

Mr. Dale's contention that a hold been placed on Mr. Vecchio's account in the summer of 2013 came as a surprise to Ms. Bedek and to the association, who had assumed holds were first placed in October of 2014, around the time IT conducted a search of email accounts. Mr. Dale had made no mention of holds when he met with OECTA representatives on November 13, 2014 to discuss the IT search. The discussions at that meeting were recorded in a document entered in evidence. The relevant portions of that document state:

> When asked if he was aware of the first two requests for email searches [made to RMC administrators and human resource staff], Chris Dale

> confirmed he had no knowledge or involvement in them, nor was he asked to place any holds on the board employees email accounts. …
>
> In answering a direct question about whether or not the IT department was directed to place a "legal hold" on the respective individuals' email accounts, Chris Dale replied that he had given no such direction.

Faced with the employer's surprising and incomplete response to its concerns, counsel for the association on April 8 posed a number of questions, seeking particulars about any holds placed in the summer of 2013. He again asserted teachers' accounts contained emails more than one year old.

Employer counsel replied on April 14. As to holds placed in the summer of 2013, she reported: Mark Weaver, the then chief information officer, had instructed Andrew Tenant, an information analyst, to place the holds; the holds were placed on August 14, 2013; no emails relating to the placement of these holds had been found; and Ms. Bedek, who would normally be the person to request holds, had no memory of having done so. Employer counsel also reported that Chris Dale, in consultation with Microsoft's support team, had just determined that the default retention protocol was not in effect because the system was misconfigured. Mr. Dale's email to counsel, describing his discussions with Microsoft, was entered in evidence.

Employer counsel's reply of April 14 also reported that targeted searches recently conducted by the IT department had discovered some of the emails produced by Ms. Hewitt but not found by the more general IT search conducted in October of 2014. A subsequent review of the emails recently found soon proved they were not as described by counsel. The IT department had found emails with the same respective dates, senders and recipients as those produced by Ms. Hewitt but these emails had different content than the ones she had produced. The employer conceded it had erred in overlooking the differing content.

The association then brought an abuse of process motion based on four

grounds: (1) disablement of the grievor's email access; (2) false assertions about the default deletion protocol; (3) inconsistent representations about litigation holds; and (4) attempting to cast doubt on agreed facts as to whether the IT department had found emails produced by Ms. Hewitt. More than three hearing days were devoted to the hearing of this motion.

When Ms. Bedek was called as a witness about these matters, the explanation she offered about disablement of the grievor's email account was much the same as the one provided by her on April 2 not under oath. She described the standard policy of terminating access when someone is fired and recounted reviewing it shortly before March 24. Ms. Bedek testified the grievor's comments about her email account, made on March 24, caused her to "panic" because she thought she had made a mistake by not ending access the previous October. She attributed her oversight to having "a thousand things" on her mind as the person responsible for human resources in a school board with 55 schools and 3000 employees. In March of 2014 her normal workload had been expanded to include participation in the current round of collective bargaining and chairing a committee working with all bargaining agents to restore a balanced budget.

In cross-examination, Ms. Bedek conceded the protocol, about ending email access upon termination of employment, had been in place during her entire tenure and the grievor was the only person ever to have been exempted from it. In relation to holds placed in the summer of 2013, Ms. Bedek testified she has no recollection of directing that holds be placed. Nonetheless, she went on to say she could not imagine how IT could have determined which accounts to put on hold if she had not supplied names.

On the balance of probabilities, I conclude Ms. Bedek did forget the agreement to maintain the grievor's email access, even though this agreement was the only exception to the general application of a longstanding protocol. I come to

this conclusion for two reasons. The most compelling piece of evidence is the first email Ms. Bedek sent to Mr. Dale on March 24. Noting Ms. Michail had been terminated in the fall, Ms. Bedek asked for confirmation that the grievor no longer had email access. There would have been no need to ask this question if Ms. Bedek had remembered the agreement to exempt the grievor from the normal protocol. In addition, I think it unlikely Ms. Bedek would have deliberately breached the agreement, knowing how the grievor and association would likely react to such a breach. In my view, the evidence does not support the association's contention that Ms. Bedek's motive, in whole or in part, was to punish the grievor for challenging the employer's claim about a default deletion protocol.

In the absence of the agreement to allow the grievor continued use of her email account, termination of her email access would not have been an abuse of process. In my view, an inadvertent breach of that agreement does not amount to an abuse of process. Ms. Bedek's failure to advise the grievor or OECTA that her access was being ended demonstrated a lack of courtesy, but that too does not rise to the level of an abuse of process. I note a timely and fulsome apology was provided.

Between March 24 and April 14, the employer incorrectly and repeatedly asserted a default deletion protocol was in effect, resulting in the automatic removal of emails after one year. The employer was slow in responding to OECTA's repeated protests that teachers' accounts contained emails older than one year. Mr. Dale eventually reported that a misconfiguration of Microsoft's system explained why these emails had not been automatically deleted. In addition, when asked about holds in November of 2014, Mr. Dale indicated he was not aware of any implemented in 2013. The association understood that to mean there were no such holds, as did Ms. Bedek. In April of 2015 Mr. Dale reported that Andrew Tenant had implemented holds in August of 2013 at the direction of Mark Weaver.

Despite the mistakes made, I am not of the view that Mr. Dale acted in bad faith. The only evidence before me comes from the documents provided by the employer. They indicate Mr. Dale was initially unaware of the misconfiguration in Microsoft's program relating to auto-delete. His comments in November of 2014 about holds were explicitly limited to what he knew and what he had done in relation to holds. It is entirely possible he learned only in March of 2015 what Messrs. Tenant and Weaver had done. I find it difficult to imagine what motive Mr. Dale would have had for deliberately misleading both OECTA and his employer about the existence of holds.

The association argues an adverse inference should be drawn from the employer's failure to call Mr. Dale as a witness. The party bearing the burden of proof, the association in this case, must lead some evidence of significant probative value before the party opposite is subject to an adverse inference based on its decision not to call a witness under its control. Drawing an adverse inference in the absence of some probative evidence favouring the association would constitute a complete reversal of the burden of proof. As there is no evidence suggesting Mr. Dale acted in bad faith, I decline to draw any adverse inference based on the employer's decision to rely on documentary evidence about the production of emails.

The association also contends the employer attempted to cast doubt on facts which were the subject of an agreed stipulation. Before argument began in March of 2015, the parties agreed on a list of emails that had been provided by Ms. Hewitt but not found by the IT search in October of 2013. In mid-April of 2015, the employer mistakenly claimed some of these emails had recently been found by targeted IT searches. In fact the emails produced by the targeted searches did not have the same content as those subject to the stipulation, although they did have the same senders, recipients and dates. The employer's mistake demonstrated a

lack of due diligence. In my view, the employer's erroneous claim is better characterized as an attempt to introduce new facts, rather than as casting doubt on facts already agreed, because the agreement was about what had been found by the first IT search, whereas the mistaken claim was about what IT had later found. Nonetheless, the time frame for introducing new facts ended before argument began. From that point on, a party is not permitted to adduce new evidence without the consent of the party opposite. As the employer promptly withdrew its attempt to introduce new evidence, when its error came to light, I conclude no abuse of process occurred.

DECISION

Accommodation

The association contends the employer failed to accommodate the grievor's disability, as required by the *Human Rights Code*, by assigning her a heavy workload as a guidance counsellor.

The only evidence of the grievor asking a management representative for a reduced load relates to not doing on-calls. That request was granted after the grievor presented a medical note. There is no evidence the grievor, or anyone acting on her behalf, ever asked the employer to accommodate her disability by reducing the number of students assigned to her in the first semester or by changing her role in relation to learning-services students. Association representatives refused to file an accommodation grievance about the number of students and there is no evidence about any discussions they might have had with management. Ms. Bourke spoke to the principal and vice-principal, about the imbalance of guidance staff between the two semesters, but there is no evidence indicating the acting department head sought accommodation on the grievor's

behalf. When testifying on this point, Ms. Bourke referred to the grievor's inexperience as a guidance counsellor but not her disability. An employee seeking accommodation bears the onus of asking management to provide it. Here no such request was made in relation to the grievor's student load in general or learning service students in particular.

The association suggests Mr. Vecchio deliberately assigned a larger than normal workload to the grievor in an attempt to create difficulties for her. There is no evidence supporting this contention. The grievor was not singled out for special treatment. The number of students assigned to her in the first semester was no greater than the number assigned to Ms. Bourke, the only other person working full-time in guidance. Moreover, Ms. Bourke was the one who initially decided not to assign any students to Collette McNally. In these circumstances, I decline to draw an inference of deliberate discrimination by Mr. Vecchio based on the employer's decision not to call him as a witness to testify.

Harassment Policy

Article 31.01 of the collective agreement states:

> The Board and O.E.C.T.A. agree that every teacher has the right to freedom from Harassment as described in the Board's Harassment Policy and Regulations.

The policy itself adopts the definitions of harassment found in two statutes. Section 1(1) of the *Occupational Health and Safety Act* defines harassment as "a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome." The same definition appears is s. 10(1) of the *Human Rights Code*. This definition must be read in conjunction with section 5(2) of the *Code* conferring on every employee a right to

be free from harassment "because of" any of the prohibited grounds of discrimination including disability.

Principal Vecchio

Mr. Vecchio's conduct on December 11 has already been addressed by Ms. Hewitt. She concluded he had created "a hostile or intimidating environment" for Ms. Michail and, therefore, had engaged in harassment within the meaning of the employer's policy. The course of conduct found by Ms. Hewitt to constitute harassment included: (1) tapping the grievor on the temple while making a condescending comment; (2) not informing Ms. McNally that he had accepted the grievor's offer to contact the coop teachers; (3) telling Ms. McNally he understood why she was upset by the grievor's email to the coop teachers; and (4) then displaying anger and raising his voice when discussing the email with them.

As Ms. Hewitt made no reference to disability, or any other prohibited ground of discrimination, I understand her finding to be that Mr. Vecchio had engaged in harassment within the meaning of the *Occupational Health and Safety Act*, not within the meaning of the *Human Rights Code*. The employer does not contest her finding.

I note Ms. Hewitt made no finding about the temple tapping being done in anger, apparently because the grievor did not allege anger when interviewed by her. The dictionary meaning of tap is strike lightly, but even light strikes can vary in force. Ms. Hewitt viewed Mr. Vecchio's tapping, coupled with his condescending comment and subsequent conduct during the coop bus incident, as being sufficiently serious to constitute harassment. Ms. Hewitt was not required to make any finding about the precise degree of force involved in the tapping because

she was not asked to put a dollar figure on a damage award. As I am required to quantify damages, there is a need for me to be more precise.

I find the grievor's testimony that the tapping was forceful and done in anger to be an exaggeration. This description is at odds with her contemporaneous accounts of what occurred. She immediately showed Ms. Bourke what had happened, asking if that was "normal." It is highly unlikely the grievor would have had any doubt as to whether a hard tap done in anger was normal. She recounted a "physical touch" in an email sent to her union representative the next day. This description is consistent with Dr. Reist's report saying the grievor complained of being "touched." Based on this evidence, I conclude the tapping was relatively light and not done in anger.

The grievor testified she had no objection to Mr. Vecchio hugging her on previous occasions. Moreover, she admits putting her hand on his arm soon after the tapping occurred. This evidence indicates not all physical contact with the principal was unwelcome to her. It is understandable why a touching of the temples, coupled with a condescending comment, was unwelcome. Nonetheless, in my view, it would have been more unwelcome coming from a stranger or an acquaintance with whom she avoided all physical contact.

Mr. Vecchio compounded his misconduct by making elaborate efforts to cover his tracks in relation to what had happened on December 11. He repeatedly denied tapping the grievor's temples in the course of their conversation about the PA. First he claimed an inability to recall that conversation and then he claimed it had not occurred. He gave one contemporaneous account of the fracas relating to the coop bus and then provided a very different account after the grievance had been filed, one that cast the grievor in a much worse light.

His response to the January 30 incident involving the grievor and Shannon Askew was not even-handed. Ms. Askew reported being "confronted" by the

grievor in the main office, but Mr. Vecchio's email to Ms. Davis casts the grievor in a worse light, accusing her of "attacking" the secretary. In much the same vein, on February 14 he alleged the grievor had "intimidated" Ms. Askew in the front office. As Ms. Hewitt found, Mr. Vecchio acted improperly by deciding the grievor was at fault without even seeking her version of what had transpired. In my view, by embellishing Ms. Askew's account of this incident and attributing blame to the grievor before hearing her version, Mr. Vecchio demonstrated a bias against her.

Mr. Vecchio's conduct in February of 2013, in relation to performance concerns, is addressed below.

Other RMC Staff

Ms. Michail testified she was mistreated by several other members of the staff at RMC. Some of those about whom she testified were neither named in the grievance nor mentioned by association counsel during argument: (1) Tom Dutton, the head custodian; (2) Barb Mahon, a learning services teacher; (3) Mary Bechberger, the head of religion; and (4) Kimberly Lajoie, the chaplain. In my view, the grievor's account of her dealings with these people reveals no more than the type of low level conflict that often occurs in workplaces. Nothing these individuals are alleged to have done rises to the level of harassment as defined by law.

As to what constitutes harassment in a legal sense, I concur with the sentiments expressed in *S. v. M, G, Z* (1995), 49 L.A.C. (4th) 193 (Laing), where the arbitrator wrote:

> [E]very act by which a person causes some form of anxiety to another could be labelled as harassment. But if this is so, there can be no safe interaction between human beings. Sadly, we are not perfect. All of us, on occasion, are stupid, heedless, thoughtless or insensitive. The question then is when are we guilty of harassment?
>
> I do not think every act of workplace foolishness was intended to be captured by the word harassment. This is a serious word, to be used seriously and applied vigorously when the occasion warrants its use. It should not be trivialized, cheapened or devalued by using it as a loose label to cover petty acts of foolish words, where the harm, by any objective standard, is fleeting. (para. 230 and 231)

Ms. Michail's complaints about incidents of very minor conflict with co-workers, ranging from the custodian to the chaplain lead me to conclude she is prone to complain about things most people would accept as an inevitable byproduct of human interaction. The fact she feels aggrieved by their conduct demonstrates she has little tolerance for people who disagree with her.

Ms. Michail's interaction with Mr. Lucier on November 28, 2012 and January 10, 2013 also falls into the category of inevitable minor conflict. Mr. Lucier, as chair of the meeting on November 28, had established a one-student rule. The grievor was not the only participant who opposed this rule but she was the only one to openly defy it during the course of a meeting. Other opponents took more appropriate steps to change the rule in advance of the next meeting. The grievor attempted to distribute copies of a long list of students, determined to address more than one and not caring whether the meeting ran overtime. Mr. Lucier should have allowed her to distribute the list, even if he insisted she comment on only one student. Instead, he pushed the papers back at her. In my view, both the grievor and the meeting chair behaved inappropriately.

Faced with this conflict between the grievor and Mr. Lucier, Mr. Sheardown asked her to identify the one student who was causing a loss of sleep. Based only on what happened at the meeting, I would be inclined to view Mr. Sheardown's

comment as an attempt to lighten the mood and move pass the awkwardness caused by the grievor's defiance of the chair and his over-reaction to her defiant attitude. The association contends the vice-principal's interjection should be seen in a more sinister light, based on other evidence. In my view, the evidence viewed as a whole gives very little reason to think Mr. Sheardown's interjection was anything other than a well-intentioned attempt to end a conflict between two colleagues. In these circumstances, I am not prepared to draw an adverse inference from the fact Mr. Sheardown was not called as a witness.

Ms. Michail testified Mr. Lucier "pushed" her arm on January 10. She demonstrated a relatively hard push during her testimony. She previously told Ms. Hewitt he had "nudged" her arm. The Hewitt report is hearsay. Nonetheless, the grievance requested an independent investigation, and I not inclined to overlook what the grievor apparently told the investigator, where it conflicts with her later testimony, at least in circumstances where no explanation is offered for the apparent discrepancy. I accept as accurate the grievor's initial description of what occurred as a nudge and view her later account as another exaggeration.

When Mr. Lucier nudged the grievor's arm, he stated she had told him not to worry about the student they were discussing. Mr. Lucier then "engaged" Mr. Sheardown about losing sleep. Given the state of relations between the grievor and Mr. Lucier, his nudge was inappropriate. However, I do not view it as rising to the level where the vice-principal would have been legally obliged to correct him, especially since the grievor voiced no complaint at the time. As there is no evidence of what Mr. Sheardown did after being "engaged" by Mr. Lucier, other than laugh, I am unable to conclude the vice-principal did anything that could be properly characterized as harassment.

Ms. Michail was not invited to the meeting on January 24, 2013 convened by Megan Boast. Ms. Boast invited Mr. Sheardown and Hanna Krzeminska by

email, asking them to notify others who should be there. Ms. Krzeminska notified Mr. Lucier. The grievor blames Mr. Sheardown for not inviting her. After Ms. Bourke emailed all of those who attended the meeting, saying the grievor should have been invited, Mr. Sheardown replied he had not read the grievor's email until after the meeting. As Mr. Sheardown did not attend the meeting, he would not have known about the grievor's absence until notified by Ms. Bourke. Viewed as a whole, the evidence offers little basis to think Mr. Sheardown intentionally excluded the grievor from this meeting. In these circumstances, I draw no negative inference from the fact he did not testify about it.

I have already concluded the evidence does not support the grievor's allegation that Ms. Askew generally provided her with less support than other counsellors. Ms. Askew did fail to provide adequate support to the grievor on two occasions in late January of 2013: (1) she did not prepare materials for a school visit; and (2) she sent an email about the grievor to Fanshaw College and then waited a day before telling her about it. Ms. Askew demonstrated a lack of due diligence on these two occasions. There would have been nothing wrong in the grievor talking to the secretary about her failings in an appropriate manner. Nonetheless, Ms. Michail's reaction to the second incident was inappropriate and turned a very minor issue into something much more significant. According to the grievor's own testimony, she "challenged" Ms. Askew in the front office while "shaking" with emotion.

Collette McNally's treatment of the grievor warrants careful scrutiny based on Ms. Mazzariol's uncontradicted testimony that Ms. McNally said the grievor did not deserve to be in the guidance department, an apparent reference to her obtaining the position of counsellor as an accommodation for her disability. Ms. McNally admitted sending a "mean" email about the grievor. Her response to the grievor's email about the coop bus appears to have been an over-reaction. Ms.

Michail also alleged Ms. McNally generally refused to provide information, albeit without providing any specifics. With the exception of the over-reaction to the coop bus incident, which does not rise to the level of harassment in isolation, there is no evidence to suggest the grievor brought her concerns about Ms. McNally to the attention of any management representative during the 2012-13 school year. The employer cannot be faulted for not addressing concerns that were not brought to its attention.

Human Resources Staff

The association contends Amy Davis discriminated against the grievor by making light of her need for accommodation. In relation to the incident on September 20, 2012, Ms. Davis told Ms. Bedek the grievor had "made a mistake, cried at work and then called in sick the next day." In my view, this account accurately reflects the grievor's own testimony about her conduct. This account makes no mention of the grievor's description of what Mr. Vecchio had done to upset her, but there is no evidence anyone had brought his conduct to the attention of Ms. Davis.

After the grievor had provided a medical note saying she was unable to do on-call, Ms. Davis directed Mr. Vecchio to comply with the note due to the "litigious nature of the situation," but said the employer would challenge the note later because it addressed "job tasks" rather than "medical restrictions." I see nothing improper about these comments. The situation could accurately be described as litigious based on the hearing then underway relating to the first grievance. As the primary purpose of a doctor's note is to identify medical restrictions requiring accommodation, a note that does not speak to restrictions is open to challenge.

The association contends Amy Davis dismissed the grievor's concerns about Mr. Vecchio by asking her on December 21, 2012 whether she wanted to be

healthy or right. It is not clear exactly how much Ms. Davis knew at this stage about what Mr. Vecchio was alleged to have done on December 11. She had received his account of the coop bus incident. Shelley Malone may have told Ms. Davis that the grievor had reported Mr. Vecchio touching her while making a condescending comment and later yelling at her, but there is no direct evidence on this point. The evidence does not indicate whether Ms. Davis' comment about being healthy or right was made before or after the grievor demonstrated how Mr. Vecchio had tapped her temples. It is clear this comment was made after the vice-president of the local unit had joined with Ms. Davis in saying the grievor should have responded positively to Mr. Vecchio when he apologized or at least extended an olive branch. Weighing all of the evidence, I conclude it does not indicate Ms. Davis' comment amounted to unlawful discrimination.

Ms. Davis' email to Mr. Vecchio, about her "glamourous" visit to Walmart, was in bad taste, but this communication, to which the grievor was not a party, does not rise to the level of discrimination.

Karin Kristoferson failed to properly investigate the complaint about Nick Vecchio made by Ms. Michail on January 4, 2013 to which the human resources officer replied on February 12. In my view, it is likely Ms. Kristoferson discussed the grievor's allegations with Mr. Vecchio, he denied them, and she accepted the denial. On the balance of probabilities, I conclude Ms. Kristoferson discussed the details of the complaint with Mr. Vecchio before the end of January. She was not called as a witness to testify otherwise. She accepted his version of events without interviewing the grievor as to what had occurred on December 11. Nor did she interview the others present during the fracas about the coop bus.

In her reply to the grievor on February 12, Ms. Kristoferson contended that Mr. Vecchio had apologized for his conduct at the meeting on December 21. This contention is at odds with the account of this meeting contained in the grievor's

complaint, saying Mr. Vecchio's only "apology" was to say he was not mad at her. There is no evidence as to how Ms. Kristoferson, with the grievor's account in hand, wrongly concluded Mr. Vecchio had given a meaningful apology.

Ms. Kristoferson's failure to properly investigate the grievor's complaint violated her right under article 31.01 of the collective agreement to be free from harassment.

Ms. Kristoferson also prepared a memorandum, dated September 2, 2014 about the grievor's employment history. It was presented to members of the board's administrative council, comprised of its senior officers, as background for a presentation to the council by Ms. Bedek. The memorandum purports to summarize the findings in my first award and the Hewitt report. Ms. Kristoferson described my first decision as "awarding 7,500 as damages for injury to dignity, feelings and self-respect for the meeting that occurred with Mr. Sheardown." This incomplete description not only fails to say Mr. Sheardown's conduct at the meeting was found to have violated the *Human Rights Code* but also makes no mention of three additional violations of the *Code* found by me to have occurred. The award of $7,500 was the remedy granted for all four violations.

Turning to the Hewitt report, Ms. Kristoferson provided the following summary:

> [Ms. Hewitt] found that Nick Vecchio's handling of the situation in December 2012 was not appropriate and demonstrated a lack of judgement. However, she determined that the meeting to discuss performance concerns on February 14, 2013 was not direct retaliation for the concerns raised in January of 2013.

This account omits most of the significant findings in the Hewitt report. Ms. Hewitt conclude Mr. Vecchio violated the school board's harassment policy by: (1) tapping the grievor's temples while making a condescending comment, despite his

denial of doing so; and (2) displaying anger and raising his voice during the coop bus fracas fueled by his prior conduct showing a lack of judgement.

Ms. Kristoferson's memorandum also did not disclose Ms. Hewitt's reason for concluding Mr. Vecchio had not retaliated against the grievor. Ms. Hewitt did not review the merits of the performance concerns because her mandate did not encompass such a review. She concluded there had been no retaliation because she accepted the false claim that Mr. Vecchio had been unaware of the grievor's January 4, 2013 complaint when addressing performance concerns in February. In this regard, Ms. Hewitt wrote:

> The evidence does not establish that the reason for [the February 14] meeting, or the letter that followed, was, as contended by Ms. Michail, direct retaliation for having filed a complaint"… In fact the evidence indicates that as of February, 2013 Mr. Vecchio had not even been made aware of the allegation regarding tapping Ms. Michail on the temple with his fingers. Accordingly, in my opinion there is insufficient evidence that the meeting and the concerns raised constituted harassment and I therefore find no breach of policy in that regard.

The premise Mr. Vecchio did not know of the complaint in February of 2013 is the only reason cited by Ms. Hewitt for concluding there had been no retaliation. This premise is false. I have already concluded Ms. Kristoferson discussed the complaint with Mr. Vecchio by late January of 2013. In other words, she wrote the memorandum for administrative council knowing Mr. Vecchio had been aware of the complaint when dealing with performance issues. She should have told administrative council that Ms. Hewitt's finding of no retaliation was based on a false premise. In the absence of any explanation from Ms. Kristoferson for not revealing this premise to be untrue, I conclude on the balance of probabilities she engaged in deception.

In short, the summary provided by Ms. Kristoferson's in her memorandum was both very incomplete and deliberately misleading. The picture it paints is

heavily skewed in favour of Mr. Sheardown and Mr. Vecchio and significantly understates the adverse findings made by an arbitrator or external investigator respectively. The memorandum, revealing a strong bias in favour of the vice-principal and principal, was written in early September, 2014, more than a year after the period covered by the instant grievance. Nonetheless, it deals with events during that period and I think it likely Ms. Kristoferson was motived by a similar bias during that period.

The association contended Maureen Bedek should be viewed as sharing responsibility for the deficiencies in the Kristoferson memorandum by virtue of having submitted it to administrative council. This contention assumes Ms. Bedek had read my first award and the Hewitt report and was aware of the deficiencies in the memorandum. There is no evidence to support this assumption. Ms. Bedek may have relied upon Ms. Kristoferson to read these documents and accurately summarize them.

Reprisal

The association contends Mr. Vecchio's role in the February 14, 2013 meeting about performance concerns, and his letter of February 19 letter on the same subject, were a reprisal for the grievor's complaint about him made on January 4.

The grievor worked in the RMC guidance department for approximately one year before any concerns about her performance were raised. Yet within weeks of her January 2013 complaint about Mr. Vecchio, he convened a meeting to address eight concerns, some of which related to the grievor's long-standing practices when meeting with students in her office. There is some documentary evidence suggesting two parents, a grandparent and a social worker raised concerns at this time, but no witnesses were called by the employer to testify about this. Even if

Mr. Vecchio was obliged to take some action in relation to certain issues, the manner in which he proceeded would still be troubling. With one exception, the performance issues in question were not discussed informally with the grievor before the meeting at the board's head office on February 14. The grievor's request to be informed of the nature of those concerns in advance of the meeting was denied. Minutes of the meeting, one set taken by a management representative and another taken by an association representative, portray a meeting where Mr. Vecchio presented conclusions about deficient performance by the grievor, rather than a meeting where he raised concerns but suspended judgement pending a response from her. The employer led no evidence to explain the unfair manner in which performance issues were handled. I have already concluded both Mr. Vecchio and Ms. Kristoferson, who orchestrated the meeting on February 14, had demonstrated a bias against the grievor after her complaint was lodged. Weighing all of the evidence, I conclude the manner in which performance issues were addressed was at least in part a reprisal for the grievor's complaint. This reprisal contravened article 31.01 of the collective agreement conferring a right to be free from harassment.

It is important to note the reprisal did not result in the grievor being formally disciplined: no sanction appeared on her record that could lead to progressively greater discipline in the future. She was not even warned of the prospect of future discipline. Nonetheless, she was chastised by Mr. Vecchio for numerous instances of allegedly poor performance in the presence of two other management representatives and two union representatives.

The association contends Mr. Sheardown was also complicit in the ill-motivated performance review. The evidentiary record contains little support for this contention. It merely demonstrates he played a role in relaying information to Mr. Vecchio and inquired whether a comment made by the grievor about a student

related to his sexual orientation. In this context, I decline to draw any adverse inference based on the fact Mr. Sheardown did not testify.

Mobbing

The association contends Ms. Michail was victimized by a mob led and encouraged by Nick Vecchio. According to counsel for the association, the mob includes Rick Sheardown, Rod Lucier, Collette McNally, Karin Kristoferson, Amy Davis and perhaps Maureen Bedek. When testifying, the grievor claimed Barb Mahon and Shannon Askew were among the group of people mistreating her. She also alleged Tom Dutton maltreated her because he felt Mr. Vecchio would approve.

The grievor was mistreated by Mr. Vecchio on December 11, 2012 and during the ill-motivated performance review in February of 2013. Karin Kristoferson failed to properly investigate the December harassment and was complicit in the subsequent performance review. Collette McNally objected to the grievor being accommodated in the guidance department and sent snide emails about her. Ms. McNally also contributed to Mr. Vecchio's harassment of the grievor on December 11 and later supported his misleading account of what happened that day.

On the other hand, Ms. Michail over-reacted to her disagreements with Mr. Dutton, Ms. Mahon, Ms. Lajoie and Ms. Bechberger. She was at least as much to blame as Mr. Lucier for the conflict between them on November 28, 2012. She behaved inappropriately towards Shannon Askew on January 30, 2013. Some of the RMC staff members whom the grievor views as members of a mob apologized to her for conduct she found unwelcome: Mr. Sheardown apologized for not being clearer when he referred her to Mr. Lucier; Mr. Lucier apologized for not notifying

her of the meeting on January 24; and Ms. Askew apologized for not preparing materials for a school visit.

In short, the grievor was mistreated by Mr. Vecchio and two others. The contention that she was harassed by others is not supported by the evidence. She was not mobbed.

Employer's Response to First Award and Hewitt Report

The letter Superintendent DeDecker sent to Mr. Vecchio, after receipt of the Hewitt report, is deficient because it makes no mention of several adverse findings contained in the report: Mr. Vecchio tapped the grievor's temples but repeatedly denied doing so; he raised his voice in anger during the coop bus fracas; and he failed to make any inquires of her before concluding she had intimidated Shannon Askew. Moreover, there is nothing in the letter indicating it was disciplinary in nature or required any remedial action on the principal's part. The letter suggested Mr. Vecchio take an emotional intelligence course but it did not require him to do so. He was not even required to review the harassment policy. Even if Mr. Vecchio did show contrition, his misconduct was sufficiently serious to warrant some consequence beyond a letter stating he had shown bad judgement. In my view, the employer's failure to take meaningful action, based on Ms. Hewitt's findings, compounded it's liability for his initial violation of article 31.01 of the collective agreement.

On the other hand, the employer deserves credit for appointing an investigator, as requested by the grievance, and for not contesting before me any adverse findings made by the investigator. It is unfortunate so much hearing time was devoted to testimony by association witnesses about facts not contested by the employer.

Mr. Sheardown was not disciplined by the employer after the issuance of my first award finding his public scolding of the grievor had violated the *Human Rights Code*. Nonetheless, I do not view the absence of discipline as compounding the employer's liability for his wrongdoing. As noted in my first award, Mr. Sheardown's public scolding of the grievor was not pre-meditated and occurred in the context of his well-intentioned, albeit not well-executed, attempt to assist the grievor in dealing with colleagues who did not welcome her accommodation in the guidance department. In this context, given that he had been publicly sanctioned by the findings I made against him, it was not unreasonable for the employer to decide no further action was required on its part.

REMEDY

The association seeks damages of three types: (1) damages for mental distress; (2) punitive damages and (4) special damages.

Damages for Mental Distress

Counsel for the association relies on the decision of the Supreme Court of Canada in *Fidler* v. *Sun Life Assurance Co. of Canada*, [2006] S.C.R. 3. Faced with a wrongful denial of disability benefits under a group insurance policy in *Fidler*, the Supreme Court held damages for mental distress, flowing from a breach of contract, may be awarded where such distress was within the reasonable contemplation of the parties at the time they made the contract. Counsel for the association contends article 31.01 of the collective agreement, conferring a right to be free from harassment, is analogous to an insurance policy in the sense that distress is a reasonably foreseeable consequence of a violation.

Counsel for the employer contends that damages for mental distress should not be awarded for breach of a collective agreement, even though the courts have awarded such damages in the context of individual contracts of employment. According to this line of argument, such damages should not be awarded to an employee governed by a collective agreement who is not a party to that agreement. I am not persuaded by this argument. As employees covered by a collective agreement are entitled to damages for lost wages and benefits, despite not being a party to the contract, I see no reason why they should not also be entitled to damages for mental distress in appropriate circumstances.

Employer counsel also argued damages for mental distress should be awarded only in the context of a termination of employment. Once again I disagree. In my view, such damages may be awarded, applying the principles set out in *Fidler*, whenever a breach of contract causes significant psychological harm and the other criteria in *Fidler* are met. Such harm is more likely to occur in the context of a termination of employment (or constructive termination) but it may also occur in other circumstances. In the case at hand, article 31.01 of the collective agreement created an expectation of protection against harassment. The repeated breach of that provision caused significant psychological harm to the grievor. Damages for mental distress are warranted in these circumstances.

Turning to the quantum of damages, counsel for the association contends the employer's misconduct satisfies the requirements for the tort of intentional infliction of mental suffering, arguing this characterization of the misconduct should be reflected in the amount awarded as damages for mental distress. Two cases were cited dealing with this tort: *Boucher v. Walmart*, [2014] ONCA 419; and *Clark v. Canada*, [1994] 3 F.C. 323. The three elements of intentional infliction of mental suffering were succinctly stated in *Boucher* at para. 41: (1) the defendant's conduct was flagrant and outrageous; (2) the defendant's conduct was

calculated to harm the plaintiff; and (3) the defendant's conduct caused the plaintiff to suffer a visible and provable illness. The store manager in *Boucher* continuously humiliated and demeaned the assistant manager in front of co-workers, over a period of six months, after she refused to falsify a temperature log. His objective was to force her to quit and he was over-joyed when she did. The Court of Appeal sustained the jury's finding that this conduct amounted to intentional infliction of mental suffering. Calling the jury's award of $100,000 "undoubtedly high", the Court of Appeal nonetheless upheld this award out of deference to the jurors.

In *Clark* a female RCMP officer was subjected to continuing sarcastic and sexist comments by male colleagues despite her objections. The sergeant said she was not a real woman. Others called her a "butch" and watched pornographic movies in her work area. She eventually resigned. The Federal Court cited with approval legal texts stating the quality of outrageousness might be based on "the special position of authority of the defendant" or "the defendant's knowledge the plaintiff is especially sensitive" (para. 61). The court awarded $5,000 as damages, far less than was awarded by the jury in *Boucher* in analogous circumstances.

Notwithstanding the employer's argument to the contrary, I conclude the facts at hand do satisfy all of the elements of the tort of intentional infliction of mental suffering. The reprisal in particular was flagrant and outrageous. It was intended to cause psychological harm, in the sense that such harm was reasonably foreseeable based on what the employer knew about the grievor's mental health. Dr. Reist's report leaves no doubt such harm resulted from the misconduct of Mr. Vecchio and Ms. Kristoferson.

On the other hand, I reject the association's argument that any conduct resulting in foreseeable psychological harm to a disabled person constitutes

discrimination on the basis of disability within the meaning of the *Human Rights Code.*

Counsel for the association also cited four cases awarding very substantial sums by way of general damages for mental distress arising from the breach of a collective agreement, individual contract or human rights legislation: (1) *Sulz v. Attorney General of Canada* [2006] B.C.S.C. 99; (2) *Ontario Public Service Employees Union (Ranger) and Ministry of Correctional Services* [2013] O.G.S.B.A. 116; (3) *Kelly v. University of British Columbia* [2013] B.C. H.R.T. 302; (4) *Canadian Union of Public Employees and City of Calgary* (2013), 239 L.A.C. 55 (Smith).

The grievor in *Ministry of Correctional Services*, a correctional officer, was the victim of a decade-long campaign of harassment, based on sexual orientation, by a group of coworkers in a homophobic atmosphere which management did almost nothing to address. He was ultimately driven from the workplace, a bitter and distrustful person. The award of general damages was $45,000.

The complainant in *Kelly* was terminated from a medical residency program because of a learning disability. The tribunal's first decision found the termination to be discrimination based on disability because the complainant should have been accommodated. He was reinstated to the program after a lapse of 6 years. During this period he was unable to find work commensurate with his education and suffered from depression with suicidal thoughts. The second decision, issued after his reinstatement, awarded $75,000 as general damages.

The grievor in *City of Calgary* was fondled by her supervisor on several occasions. The failure of senior management to address her initial complaint allowed these sexual assaults to continue. A senior manager criticized her for showing a lack of respect when she refused to continue working with the offending supervisor. The employer subsequently asked her to undergo an IME with a

psychiatrist. She left work soon after never to return. A few months later she was admitted to hospital with suicidal ideation. Her psychologist described her as "essentially housebound" and would require years of treatment to improve her functioning. She was awarded $125,000 in general damages.

The same amount was awarded as general damages in *Sulz* to a RCMP officer who reported 48 incidents, over a period of approximately one year, of profanity and derogatory sexist comments, primarily by her typically angry detachment commander but also by two sergeants. (The court's decision does not clearly indicate to what extent these allegations were found to be true.) She suffered a major depressive disorder and ultimately received a medical discharge. A psychologist's report indicated she was likely to suffer from depression for the rest of her life. A neuropsychologist reported she was "competitively unemployable" and capable of only doing only uncomplicated tasks on a part-time basis.

The facts at hand merit a significantly smaller amount of damages than were awarded in any of the cases cited by the association. Those cases differ markedly from this one, both in terms of the severity of the misconduct and the impact on the person mistreated. Almost all of these cases (*Boucher, Clark, Ministry of Correctional Services, City of Calgary* and *Sulz*) involved a sustained campaign of harassment that lasted several months or even years. The mistreatment of the aggrieved employee in each of those cases ended in a termination of employment, either by dismissal or constructive dismissal. In some cases (*City of Calgary* and *Sulz*), the victim was so psychologically damaged that she was unemployable at least in the short term. The victim in some cases (*Kelly* and *City of Calgary*) was suicidal.

Counsel for the association urged me to bear in mind my first award holding the employer liable for failing to properly accommodate the grievor's disability. I

note that award did not call into question the conduct of Mr. Vecchio or Ms. Kristoferson. Moreover, no failure to accommodate, or other discrimination based on disability, occurred during the 2012-13 school year now under consideration. In these circumstances, I do not view my previous award as have any bearing on the calculation of damages in the case at hand.

My award of damages is based on the following factors: (1) Mr. Vecchio's touching of the grievor's temples while making a condescending comment; (2) his angry use of a raised voice during the coop bus fiasco which he had already fueled by failing to acknowledge his approval of the grievor contacting coop teachers; (3) the grievor being publicly chastised about her performance partly in reprisal for her complaint about Mr. Vecchio; (4) the psychological distress and physiological harm to the grievor resulting from all of the foregoing; (5) her known psychological and physiological vulnerability; (6) the employer's failure to discipline Mr. Vecchio, or require him to take any remedial action, based on the findings of the investigation report; and (7) as a mitigating factor, the employer's decision not to contest adverse findings by the investigator. In relation to psychological harm, I have considered only the distress suffered by the grievor, as assessed by Dr. Reist, as a result of the foregoing conduct by Mr. Vecchio and Ms. Kristoferson. I note much of the distress suffered by the grievor during the school year in question was attributed by Dr. Reist to alleged misconduct by others for which no damages are awarded. With these considerations in mind, I award $20,000.

Punitive Damages

The association seeks an award of punitive damage. In *Honda Canada Inc.* v. *Keays*, [2008] S.C.R. 362, the Supreme Court ruled punitive damages should be awarded as a remedy only for misconduct that is malicious and outrageous and only where compensatory damages are insufficient to satisfy the objectives of retribution, deterrence or denunciation.

Counsel for the employer contends the facts at hand do not meet either of the criteria set out in *Keays*. I agree. It is noteworthy that punitive damages were denied in a number of cases cited by the association even though the unlawful conduct in those cases was far more serious: (1) *Sulz* involving sustained misogynistic harassment by managers; (2) *Ministry of Correctional Service* involving management inaction to end prolonged homophobic harassment and (3) *City of Calgary* involving management complacency in the face of repeated fondling. In the first two cases, punitive damages were denied, not because the large amount awarded as compensatory damages was sufficient to denounce and deter, but because the conduct was not sufficiently flagrant.

Special Damages

The association claims compensation for some of the grievor's expenditures: (1) the amount paid for the airline ticket not used during the Christmas break in the 2012-2013 school year; and (2) the amount paid for psychological services during the same school year. The employer did not oppose this claim. I direct that these expenditures be reimbursed upon production of appropriate receipts.

Removal of Letter

The association seeks an order directing the employer to remove from the grievor's personnel file the letter dated February 19, 2013 concerning performance issues. I so order.

Richard M. Brown

Ottawa, Ontario
July 23, 2015